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IN THE

Supreme Court of the United States

October Term, 1976

No. 76-1739

BRUCE JOHNSON, a minor, by Earl D. Johnson, his guardian *ad litem;* LISA JACKSON, a minor, by Doreen G. Jackson, her guardian *ad litem;* DAWN JACKSON, a minor, by Doreen G. Jackson, her guardian *ad litem;* ROBYN DEXTER, a minor, by Alice Dexter, her guardian *ad litem,* and MICHELLE HENRIOT, a minor, by A. W. Henriot, her guardian *ad litem,*

Petitioners,

vs.

HUNTINGTON BEACH UNION HIGH SCHOOL DISTRICT, RALPH H. BAUER, as trustee of Huntington Beach Union High School District; RON SHENKMAN, as trustee of Huntington Beach Union High School District; ROBERT A. KNOX, as trustee of Huntington Beach Union High School District; HELEN E. DITTE, as trustee of Huntington Beach Union High School District; DON McALLISTER, as trustee of Huntington Beach Union High School District; and DOE ONE through DOE TWENTY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI

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TOPICAL INDEX

	Page
Introduction	1
Jurisdiction	2
Reasons for Granting the Writ	3
Statement of Facts	4
Constitutional Provisions Involved	6
Argument	7
I In the context of an ongoing program of recognizing student organizations, and granting use of school facilities for meeting and communication purposes, a school district is not prohibited by the United States Constitution from granting the same privileges to a student group with religious interests as are granted to student groups with secular interests	7
A. The Establishment Clause does not purport to forbid the granting of recognition and/or facilities use to these students	7
B. Assuming [*arguendo*] that the Establishment Clause is really involved in the issue set forth hereunder, the value of the rights sought to be protected by the Establishment Clause are outweighed by the value of other First and Fourteenth Amendment rights	19
(a) Traditional First Amendment rights of free expression and assembly	22

TOPICAL INDEX

Argument (cont'd) — Page

(b) The right to the free use of a public forum, a modern penumbral right of constitutional dimension 25

(c) Equal protection of the laws 26

II In the context of an ongoing program of recognizing student organizations and granting use of school facilities for meeting and communication purposes, a school district is not prohibited by the California Constitution from granting the same privileges to a student group with religious interests as are granted to student groups with secular interests 28

A. Article IX, Section 8, does not forbid the activities proposed by petitioners 28

B. Article XVI, Section 5, does not forbid the activities proposed by petitioners 30

III In the context of an ongoing program of recognizing student organizations and granting use of school facilities for meeting and communication purposes, if any provision of the California law (including the California Constitution) purports to prohibit a school district from granting the same privileges to a student group with religious interests as are granted to student groups with secular interests, such provision of California law violates the United States Constitution and is invalid 31

TOPICAL INDEX

Argument (cont'd) — Page

A. Such a provision would violate the Establishment Clause 32

B. Such a provision would violate the Free Exercise of Religion Clause 33

C. Such a provision would violate the Freedom of Expression and Freedom of Association Clauses, the right to Free Use of a Public Forum, and the Equal Protection Clause 34

D. Board Rule 5144 and Staff Rule 5144 [set forth at footnotes 2 and 3, Appendix pages 2 and 3] violate the Due Process Clause 36

Conclusion 37

Index to Appendix

Appendix "A" through "E"

TABLE OF AUTHORITIES CITED

Cases

Abington School District v. Schempp (1963), 374 U.S. 203, 83 S. Ct. 1560, 10 L. Ed. 2d 844 ..... 9, 10, 11, 16, 32

American Civil Liberties Union v. Radford College (1970), 315 F. Supp. 893 ..... 23, 24

Braunfeld v. Brown (1961), 366 U.S. 599, 81 S. Ct. 1144, 6 L. Ed. 2d 563 33

TABLE OF AUTHORITIES CITED

Cases (cont'd)	Page
California Educational Facilities Authority v. Priest (1974), 12 Cal. 3d 593	30
Committee for Public Education v. Nyquist (1973), 413 U.S. 756, 93 S. Ct. 2955, 39 L. Ed. 2d 948	17, 18, 19, 32
Danskin v. San Diego Unified School District (1946), 28 Cal. 2d 536	27
Edwards v. South Carolina (1963), 372 U.S. 229, 83 S. Ct. 680, 9 L. Ed. 2d 697	19
Engel v. Vitale (1962), 370 U.S. 421, 82 S. Ct. 1261, 8 L. Ed. 2d 601	9, 16
Everson v. Board of Education (1947), 330 U.S. 1, 67 S. Ct. 504, 91 L. Ed. 711	37
Freedman v. Maryland (1965), 380 U.S. 557, 85 S. Ct. 734, 13 L. Ed. 2d 649	34
Gay Students Organization v. Bonner (1974), 509 F. 2d 652	24
Gordon v. Board of Education (1947), 78 Cal. App. 2d 464	29, 30
Healy v. James (1972), 408 U.S. 169, 92 S. Ct. 2338, 33 L. Ed. 2d 266	8, 22, 23, 24
Hudson v. Harris (1973), 478 F.2d 244	23
Johnson v. Robinson (1974), 415 U.S. 361, 94 S. Ct. 1160, 39 L. Ed. 2d 389	35, 36
Jones v. Board of Regents (1970), 436 F.2d 618	37

TABLE OF AUTHORITIES CITED

Cases (cont'd)	Page
Keegan v. University of Delaware, ... Del. ....., 349 A.2d 14, cert. denied 44 U. S. Law Week 3473	13, 21
Kunz v. New York (1951), 340 U.S. 290, 71 S. Ct. 312, 95 L. Ed. 267	15, 16, 17
Kusper v. Pontikes (1973), 414 U.S. 51, 94 S. Ct. 303, 38 L. Ed. 2d 260	35
Lawrence v. Buchmueller (1963), 243 N.Y.S. 2d 87	12, 13
Lemon v. Kurtzman (1971), 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745	14, 17, 18, 19
Los Angeles v. Kirk (1905), 148 Cal. 385	29
McCollum v. Board of Education (1948), 333 U.S. 203, 68 S. Ct. 461, 92 L. Ed. 649	9, 10, 11, 13, 15, 16, 21
Meek v. Pittinger (1975), 421 U.S. 349, 95 S. Ct. 1753, 44 L. Ed. 2d 217	17, 18, 20
Moore v. Board of Education (1965), 212 N.E.2d 833	12
Niemotko v. Maryland (1951), 340 U.S. 268, 71 S. Ct. 325, 95 L. Ed. 267	15, 16, 17, 31
O'Hair v. Paine (1969), 312 F. Supp. 434, affirmed per curiam 432 F. 2d 66, cert. denied 401 U. S. 955	14
Police Department of Chicago v. Mosley (1972), 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d 212	25, 26

TABLE OF AUTHORITIES CITED

Cases (cont'd)	Page
Reed v. Van Hoven (1965), 237 F. Supp. 48	11, 13, 21
Saia v. New York (1948), 334 U.S. 558, 61 S. Ct. 1148, 92 L. Ed. 1574	15, 16, 17
Schneider v. State (1939), 308 U.S. 147, 60 S. Ct. 146, 84 L. Ed. 155	27
Smith v. Smith (1975), 523 F.2d 121, cert. denied 44 U. S. Law Week 3416	17
Stacy v. Williams (1969), 306 F. Supp. 963	11, 21, 26, 27
Tinker v. Des Moines School District (1969), 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731	24, 25, 34, 35
Walz v. Tax Commission (1970), 397 U.S. 664, 90 S. Ct. 1409, 25 L. Ed. 2d 697	7, 8, 17
Wisconsin v. Yoder (1972), 406 U.S. 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15	13
Wood v. Davison (1972), 351 F. Supp. 543	24
Wood v. Mt. Lebanon Township School District (1972), 342 F. Supp. 1293	12
Zorach v. Clauson (1951), 343 U.S. 306, 71 S. Ct. 689, 96 L. Ed. 954	10, 11, 12, 13, 16, 17, 18

Federal Communications Commission Case

In the Matter of Revision of Rules, etc. 54 F.C.C. 2d 941	32

TABLE OF AUTHORITIES CITED

Statutes (United States)	Page
28 U.S.C. § 1257(3)	3
United States Constitution, First Amendment	3, 4, 6, 7, 8, 9, 10, 12, 13, 15, 16 17, 19, 20, 22, 25, 32, 33, 34, 37
United States Constitution, Fourteenth Amendment	3, 6, 10, 12, 19, 20, 25, 26, 27, 31, 34, 35, 36

Statutes (California)

California Constitution, Art. IX, Sec. 8	28, 29
California Constitution, Art. XVI, Sec. 5	28, 30
California Administrative Code, Title 5, Sec. 303	5
California Education Code, Sec. 12101	5

Rules (California)

Rules of Court	
Rule 28(a)	2
Rule 45	2

Text

Louisell and Jackson, Religion, Theology and Public Higher Education (1962), 50 Cal. L. Rev. 751	29

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PETITION FOR A WRIT OF CERTIORARI

INTRODUCTION

This is a petition for a writ of certiorari to review the judgment of the Court of Appeal of the State of California, Fourth District, Second Division, affirming the judgment of the Superior Court of the County of Orange, State of California.

JURISDICTION

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. § 1257(3), the Court of Appeal being a court of last resort when the California Supreme Court denied hearing.

The decision of the Court of Appeal was filed on March 11, 1977 (Appendix "A"). A timely Petition for Rehearing was denied on March 30, 1977 (Appendix "B").

A Petition for Hearing before the California Supreme Court (a court of discretion) was filed on April 21, 1977, one day late under the Rules of Court, Rule 28(a), and based on said late filing the California Supreme Court refused the Petition for Hearing. On the same day the filing was refused, counsel for appellants submitted a request for relief from default under the provisions of Rules of Court, Rule 45. Said relief was denied on April 25, 1977 (Appendix "C").

On May 6, 1977, counsel for appellants filed a petition requesting the Supreme Court to grant a hearing on its own motion pursuant to Rule 28(a), with points and authorities in support thereof (Appendix "D"). Under the provisions of Rule 28(a), the Supreme Court has the authority to exercise jurisdiction and grant hearing on its own motion within 30 days after the decision of the appellate court becomes final. The Supreme Court ignored the request and refused to hear the matter on its own motion (Appendix "E").

Counsel for appellants having made a request that the matter be heard under rules of court which allow the Supreme Court of California to exercise jurisdiction by hearing the matter on its own motion, and the Supreme

Court having refused to exercise that jurisdiction within its power, the jurisdiction of this matter is preserved, in that all state remedies have been exhausted and the decision of the Court of Appeal is that of the court of last resort.

REASONS FOR GRANTING THE WRIT

The purpose for requesting the writ is so that this Court can resolve the question of what constitutional rights under the First and Fourteenth Amendments the students on high school and college campuses have to express and exercise their religious beliefs, as a voluntary organized group, during non-classroom time, while on campus.

The Court of Appeal's majority opinion (Appendix "A" pp. 1 - 18), in effect, denies the students the right to freely assemble as an organized group on campus, while other secular groups or clubs are allowed to meet on the same terms and conditions requested by the petitioners.

The Court of Appeal has based its determination on decisions of the United States Supreme Court made in numerous cases affecting the Establishment Clause of the First Amendment. The majority, if not all, of the prior decisions of the United States Supreme Court were based on cases arising from elementary and parochial schools, and none of the decisions speaks directly as to the rights of high school and college students.

High school and college students have much greater latitude and freedom as to the control of their academic

interests and desires, and the majority of these students have already formulated some religious belief or non-belief without any influence on the part of the academic community.

The very basic foundational question which underlies the entire petition is: *What degree of accommodation is allowable to these students under the Establishment Clause and the Fourteenth Amendment to express their religious beliefs on campus?* The decision of the California Court of Appeal has set forth no accommodation at all, and goes far beyond the true limits set by the First Amendment.

It is respectfully submitted that this writ is necessary to determine the limits of accommodation for these students, if accommodation exists at all.

STATEMENT OF FACTS

For many years the respondent Huntington Beach Union High School District ("District") has had a "student clubs" program in which the public high schools have granted "recognition" to individual student clubs, and those clubs so "recognized" were allowed the use of certain facilities of the schools, including the use of rooms or other space at the schools for club meetings, the use of posting facilities for notices of club activities, and the use of the school newspaper for publicizing club activities (Tr. p. 37, ll. 3 - 11). However, for most of these years the District did not extend these privileges to students who desired to participate in student clubs formed pursuant to the religious or spiritual interests of the students (Tr. p. 37, ll. 11 - 14).

On January 8, 1974, the District passed a resolution

the purpose of which was to allow students whose interests are religious most of the same privileges it granted to students whose interests are secular. Although "recognition" was still not granted the student religious clubs, they were allowed–like other student clubs–to meet voluntarily on the campus during the school day (Tr. p. 38, ll. 1 - 6). Among the times that the religious clubs, like other clubs, were to be allowed to meet was during their lunch hour (Tr. p. 56, para. 2). The Court may take judicial notice that for many high school aged students, school attendance is compulsory (Education Code § 12101 of the State of California), and that even for students over 16 years of age, once they arrive at school voluntarily the compulsion to stay there extends to the lunch hour (5 California Administrative Code § 303). It is obvious that the lunch hour is prime time for student clubs.

On June 25, 1974, the Orange County Counsel advised the trustees of the Huntington Beach Union High School District (who were, in their official capacity, defendants in this matter) that they could not extend these freedoms to religiously oriented student clubs (Tr. pp. 46 - 48). On that same day, the defendants (respondents herein) revoked the freedoms they had granted on January 8, 1974 (Tr. p. 38, ll. 13 - 23). In so doing, the respondents were acting under the advice of the Orange County Counsel, which advice they, in good faith, believed to be correct advice (Tr. p. 39, ll. 22 - 24).

It is the position of petitioners that as of June, 1974, all of the facts forming the substantial substantive issues of this cause were complete. However, in order to go through the formal steps necessary to the framing of a lawsuit which has to do with actual, justiciable rights, and in order to exhaust

all administrative remedies, the students, including petitioners, who desired to participate in a religiously oriented student club necessarily had to (and did) file a formal application for "recognition" (Tr. p. 38, ll. 24 - 32), have it formally rejected, and go through the various administrative remedies provided by the District. They did exhaust such administrative remedies (Tr. p. 39, ll. 1 - 4).

CONSTITUTIONAL PROVISIONS INVOLVED

First Amendment - United States Constitution:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the government for a redress of grievances."

Fourteenth Amendment - United States Constitution:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, withoud due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . . . "

ARGUMENT

I

In The Context Of An Ongoing Program Of Recognizing Student Organizations, And Granting Use Of School Facilities For Meeting And Communication Purposes, A School District Is Not Prohibited By The United States Constitution From Granting The Same Privileges To A Student Group With Religious Interests As Are Granted To Student Groups With Secular Interests.

This Court has said that tensions can exist between the Establishment Clause and the Free Exercise Clause which must be worked out on a case-by-case basis (*Walz v. Tax Commission* (1970), 397 U.S. 664, 668-69 [90 S. Ct. 1409, 25 L. Ed. 2d 697]). It is especially obvious in a case like this–where questions of freedom of expression, of association, and of the use of a public forum also involve religious activity and where denial of equality in the exercise of basic rights is based exclusively upon considerations of religion–that tensions can exist between the Establishment Clause and constitutional safeguards other than the Free Exercise Clause, which (*if* the Establishment Clause is *really* involved) must be worked out on the basis of weighing the relative importance of all the constitutional considerations involved.

A. The Establishment Clause does not purport to forbid the granting of recognition and/or facilities use to these students.

In a brief concurring opinion in *Healy v. James* (1972), 408 U.S. 169, 203 [92 S. Ct. 2338, 33 L. Ed. 2d 266], Mr. Justice Rehnquist wrote: "Prior cases dealing with First Amendment rights are not fungible goods. . . . " Petitioners believe that this observation is especially appropriate when one has in view the two Religion Clauses of the First Amendment. Concerning these two particular clauses, in *Walz v. Tax Commission, supra,* 397 U.S. 664, 668, this Court emphasized the danger in assuming that broad language is transferable from one class of cases to another class of cases:

> "The considerable internal inconsistency in the opinions of the Court derives from what, in retrospect, may have been too sweeping utterances on aspects of these clauses that seemed clear in relation to particular cases but have limited meaning as general principles."

Petitioners submit that the statement just quoted was given to alert parties, counsel and judges that specific application of general statements made in connection with one group of cases (*e.g.*, those involving the expenditure of thousands or millions of dollars of tax money to aid institutional religion) will often vary from the application of those same statements when made in cases whose context is entirely different (*e.g.*, those involving the accommodation by a state-supported school of the religious interests of its students).

The fact is that precisely four definitive opinions—no more, no less—have been handed down by the United States Supreme Court in cases having to do with religious activities in the milieu of the public school system. In three of these

opinions the Court ruled that public schools cannot *sponsor* religious activities. In the fourth it held that there is no constitutional prohibition against public school *accommodation* of the religious interests of the students. It is important at the outset to state briefly the facts of each case, because these four opinions are our principal guidelines.

In *McCollum v. Board of Education* (1948), 333 U.S. 203 [68 S. Ct. 461, 92 L. Ed. 649], a school board affirmatively required 30-minute religious instruction periods to be held each week in the classrooms during the regular instruction time. It was held that this was an establishment of religion.

In *Engel v. Vitale* (1962), 370 U.S. 421 [82 S. Ct. 1261, 8 L. Ed. 2d 601], the Board of Education affirmatively required the repetition of a brief, denominationally neutral prayer which was composed by the state. It was held that the imposition of this ceremony (which was voluntary as to attendance but had to be held) is violative of the Establishment Clause.

In *Abington School District v. Schempp* (1963), 374 U.S. 203 [83 S. Ct. 1560, 10 L. Ed. 2d 844], the state required daily reading in class from the Bible followed by the recitation of the Lord's Prayer. This also was held to violate the Establishment Clause.

In each and every one of these cases the religious activities were curricular in nature. In each it appeared to the school children that the state stood behind the ideological content of the doctrinal teaching or exercise. In each the government was actively *sponsoring* religion—forbidden by the First Amendment and made mandatory

upon the states by the Due Process Clause.

Under many circumstances the state may *accommodate* an activity which it could not sponsor. The fourth United States Supreme Court decision is illustrative of this principle. That case is *Zorach v. Clauson* (1951), 343 U.S. 306 [71 S. Ct. 689, 96 L. Ed. 954], in which the arrangement was like that in *McCollum* except the weekly religious instruction was not held in the classrooms and the instructors were not under the control of the superintendent. It was held that this was *not* an Establishment of Religion.

The circumstances that *Zorach* approved off-campus activities similar to those which *McCollum* had forbidden in an on-campus situation has given rise to the simplistic notion that the only operative fact under the Establishment Clause is the place of the activity. However, Mr. Justice Brennan wrote a concurring opinion in *Schempp* in which he exploded this concept, pointing out (at p. 262 of 374 U.S.) that the "deeper difference was that the *McCollum* program placed the religious instructor in the public school classroom in precisely the position of authority held by the regular teachers of secular subjects while the *Zorach* program did not." He continued (at p. 263):

> "To be sure, a religious teacher presumably commands substantial respect and merits attention to his own right. But the Constitution does not permit that prestige and capacity for influence to be augmented by investiture of all the symbols of authority at the command of the lay teacher for the enhancement of secular instruction."

Justice Brennan is not alone in his analysis. In a concurring opinion in *McCollum*, four justices stated (at p. 230 of 333 U.S.) that the vice in the Champaign, Illinois, program was that:

> "The momentum of the whole school atmosphere and school planning is presumably put behind religious instruction, as given in Champaign, precisely in order to secure for the religious instruction such momentum and planning."

In the majority opinion in *Zorach* the Court distinguished *McCollum* on the ground that in the latter case "the classrooms were used for religious instruction and *the force of the public school was used to promote that instruction.*" (343 U.S. at p. 315; emphasis added.)

The *Zorach* Court was using the word "classroom" in the sense of a teaching unit, not in the sense of a geographic location. An emphasis on mere geography cannot be squared with the emphasis upon "prestige and capacity for influence" in Justice Brennan's concurrence in *Schempp*, or with the emphasis upon "the force of the public school" as the ultimate factor in *Zorach's* characterization of *McCollum*. (In this connection, it should be noted that the proposed Charter of the student Bible Study Club sought by petitioners herein affirmatively required that both before and after each of its meetings an announcement be made that the views therein expressed were not those of the school [Tr. p. 51, Article 6].)

The results of the post-*Schempp* decisions of state courts and lower federal courts also demonstrate the lack of significance of mere geography. In *Reed v. Van Hoven* (1965), 237 F. Supp. 48, 53, a federal district court upheld a truly voluntary on-campus prayer program which did not appear to have the imprimatur of the school. In *Stacy v. Williams* (1969), 306 F. Supp. 963, 975-76, a three-judge federal court held

invalid (on Equal Protection grounds) a University of Mississippi regulation which singled out and forbade on-campus religious meetings, pointing out (at p. 974) that the University's approval of any activity can easily be negated by merely announcing at the time that the University did not necessarily subscribe to its content. In *Lawrence v. Buchmueller* (1963), 243 N.Y.S. 2d 87, a New York court found no Establishment Clause violation in a creche being allowed on school property under circumstances where (pp. 90 - 91) "[u]nlike *Engel* . . . or . . . *Schempp* . . . which concerned active involvement by Government in religious exercises, the present case constitutes, at most, a passive accommodation to religion." In *Wood v. Mt Lebanon Township School District* (1972), 342 F. Supp. 1293, 1295, a federal district court found no Establishment Clause violation in allowing invocational and benedictional prayers to be said in on-campus graduation ceremonies where there was no "semblance of governmental establishment or even condonation."

These cases demonstrate that lack of ostensible government support will obviate any Establishment difficulties arising purely from geographical considerations. The other side of the coin is demonstrated in *Moore v. Board of Education* (1965), 212 N.E.2d 833, 843, in which an Ohio court would not permit even a *Zorach*-type of released time program off the campus where the unusual circumstances were such that "[i]n the eyes of the pupils" it appeared that the school was teaching the religious lessons. It is thus apparent that in the setting of the public school system ideological sponsorship (actual or apparent), rather

than toleration-on-school-premises, is the essence of Establishmentarianism.

Accommodation of students' religious interests is a permissible governmental activity which was held to be salutary in *Zorach, supra,* at p. 314 of 343 U.S.; which was applied generally to the field of relations between schools and pupils in *Wisconsin v. Yoder* (1972), 406 U.S. 205, 234, at footnote 22 [92 S. Ct. 1526, 32 L. Ed. 2d 15]; which was applied specifically to school premises in *Reed v. Van Hoven, supra,* at p. 53 of 237 F. Supp., and in *Lawrence v. Buchmueller, supra,* at p. 90 of 243 N.Y.S. 2d; and which was sharply distinguished from "active involvement" with religious matters in the last-mentioned decision.

Very recently the Supreme Court of Delaware ruled that the Establishment Clause would not be violated by a state university allowing regular student worship services in the commons room of its dormitories.

> "The Establishment cases decided by the United States Supreme Court indicate that neutrality is the safe harbor in which to avoid First Amendment violations: neutral 'accommodation' of religion is permitted [citations including the *Zorach* case], while 'promotion' and 'advancement' are not [citations including the *McCollum* case]."
>
> *Keegan v. University of Delaware,* ..... Del. ..... , 349 A.2d 14, 16, *cert. denied,* 44 U.S. Law Week 3473.

During the past five years the United States Supreme Court has developed a tripartite test to determine whether or not the Establishment Clause has been violated by a statute

(or, as it is herein claimed, by a nonstatutory governmental program).

> "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.' "
>
> *Lemon v. Kurtzman* (1971), 403 U.S. 602, 612-613 [91 S. Ct. 2105, 29 L. Ed. 2d 745].

The trial court conceded that "the legislative purpose–or, as in our case, the School Board action in permitting the club–would be secular in nature. It appears that the District policy to permit school clubs to be formed has a general secular purpose." (Tr. p. 72, beginning at the ninth line.) Naturally, petitioners agree with this analysis. To assume that the purpose of allowing a Bible Study Club, along with the others allowed under the District's ongoing program of accommodating all kinds of student organizations, is a religious one would be to misunderstand whose "purpose" is under consideration. In *O'Hair v. Paine* (1969), 312 F. Supp. 434 [*affirmed per curiam* 432 F. 2d 66, *cert. denied* 401 U.S. 955], the plaintiff asked a federal court to restrain NASA (a government agency) from suffering the astronauts to broadcast religious "ceremonies" of the type which were broadcast during the Apollo 8 and Apollo 11 flights. But the court held against her, saying, at page 437: "The purpose of NASA is obvious, it is solely to accommodate the astronauts." NASA had a secular purpose (to put a man on the moon) and in the carrying out of that secular purpose NASA found it reasonable to make this accommodation. The respondent District also has a secular purpose (to permit the interchange of ideas among students by

means of student clubs), which can include the accommodation of the religious interests of its students without involving the District in religious purposes.

Proceeding to the next test, the trial court drew from the stipulated facts the erroneous legal conclusion that "the primary effect in permitting this club a charter under Board Policy No. 5144 and Staff Rule No. 5144 would be to advance or inhibit religion."

It is clear that merely allowing a religious group to have a religious meeting on a piece of public property (which has been found by the officials in charge to be appropriate for meetings generally) is not an "advancement" of religion within the meaning of the decisions interpreting the Establishment Clause. Quite to the contrary, this Court has, on at least three occasions (*Saia v. New York* (1948), 334 U.S. 558 [61 S. Ct. 1148, 92 L. Ed. 1574]; *Kunz v. New York* (1951), 340 U.S. 290 [71 S. Ct. 312, 95 L. Ed. 267]; and *Niemotko v. Maryland* (1951), 340 U.S. 268 [71 S. Ct. 325, 95 L. Ed. 267]), held that under such circumstances the state may allow religious meetings in its public parks. If the Establishment Clause was considered by this Honorable Court in these cases, then they must be taken to hold that Establishment Clause "advancement of religion" does not arise from the mere use of public property for religious meetings. In at least two of these decisions the Establishment Clause issue was considered. The point was raised in *Kunz v. New York* by the dissenting opinion of Mr. Justice Jackson, who urged that *Illinois ex rel. McCollum v. Board of Education, supra,* 333 U.S. 203, had held that "the Constitution will not suffer tax-supported property to be used to propagate religion" (see 340 U.S. at p. 311, note 10). The Court had been confronted

with this argument in this context three years before *Kunz;* in *Saia,* Justice Jackson had also dissented on the basis that "only a few weeks ago [in *McCollum*] we held that the Constitution prohibits a state or municipality from using tax-supported property 'to aid religious groups to spread their faith.' " (See 334 U.S. at p. 569.) However, this rationale was considered and rejected by this Honorable Court in *Kunz* and *Saia* and, inasmuch as *Niemotko* was decided the same day as *Kunz*, presumably also in *Niemotko*. While public parks are more obviously a natural place for meetings than an otherwise unused school room, it is equally obvious that the District itself has determined (as have probably more than 95% of the country's high school districts) that its otherwise unused school rooms are an appropriate place to be used by groups of students with common interests as places in which to have meetings and exchange ideas. Having created a forum for such purposes, the District does not "advance religion" impermissibly by accommodating the religious interests of groups of its students in the unused-school-room forum any more than would a park commission "advance religion" impermissibly by accommodating the religious interests of groups of citizens in the unused-portion-of-a-city-park forum.

One cannot intelligently ignore the analysis that in *all* of the three United States Supreme Court decisions (*McCollum, Engel* and *Schempp*) in which religious activities in a public school setting were held to violate the Establishment Clause, the school board had decreed that these religious activities *must be held,* whereas in the fourth decision (*Zorach*) the school board *only allowed* the religious activity to exist within the public school students' permitted activities, and the Court

held this did not violate the Establishment Clause.

If religion is not advanced (in the constitutional sense) by students being allowed to devotionally study the Bible during curricular hours in a *Zorach*-type program—and that is what *Zorach* held (according to *Smith v. Smith* (1975), 523 F.2d 121, 125, *cert. denied,* 44 U. S. Law Week 3416) —then it is difficult to understand how religion is advanced (in the constitutional sense) by students being allowed to devotionally study the Bible on their own free time in an otherwise unused school room, unless one takes the position that the only operative fact is that government property is being used—a position which is inconsistent with *Saia, Kunz,* and *Niemotko,* and the principle without which those cases could not have been decided as they were: that there is Establishment in sponsorship but not in neutral accommodation.

The third part of the tripartite test forbids the fostering of excessive entanglement between government and religion. This is a concept conceived in *Walz v. Tax Commission, supra,* 397 U.S. 664, 674, and born in *Lemon v. Kurtzman, supra,* 403 U.S. 602, 612-613, scarcely six years ago. The only circumstance in which it has ever been applied by the Court is that in which a state statute with an ostensibly secular purpose has earmarked immense amounts of tax funds for the use of church-related schools and, in order to be sure that the funds are not used in the religious activities of the school, the statute has provided for continuing and massive government surveillance to be sure that state funds are not being used for religious purposes. (*Lemon v. Kurtzman, supra; Committee for Public Education v. Nyquist* (1973), 413 U.S. 756 [93 S. Ct. 2955, 37 L. Ed. 2d 948]; *Meek v.*

Pittinger (1975), 421 U.S. 349 [95 S. Ct. 1753, 44 L. Ed. 2d 217].)

There is no occasion for religiously-motivated surveillance in the case *sub judice*. The Orange County Counsel has pointed to cases which hold that under general tort laws a school district has the duty to have an adult present at student activities to minimize the chance that the students will be physically injured by horseplay or otherwise (Tr. p. 46, last paragraph), and he reasoned from these cases that the presence of a teacher-monitor at the meetings of the Bible Study Club would foster an impermissible surveillance (Tr. p. 47, paragraph 4). This line of reasoning ignored the fact that the surveillance forbidden by the third Establishment Clause test as expounded in *Lemon* and *Nyquist* is *religion*-related surveillance (in that its purpose is to detect religious activity), whereas the "surveillance" under consideration is safety-related. Impermissible entanglement did not arise out of the truancy-related surveillance provisions of the *Zorach* released time program. Niether does impermissible entanglement arise from safety-related surveillance requirements.

There are decisions of the United States Supreme Court (notably *Nyquist* and *Lemon*) which state that a purpose of the Establishment Clause was to avoid political division along religious lines. It must be repeated that in those cases the issue has been whether states can give away millions of dollars to church-related schools, not whether states can give the same privilege to groups of students who are interested in spiritual matters as are routinely given to groups of students who are interested in secular matters. It was one thing for the Court to consider political divisiveness when invalidating massive

grants made directly (*Lemon*) or not-too-indirectly (*Nyquist*) to institutional religion. It would be quite another thing for the Court to say that granting students the same privilege to meet and discuss religious matters as is granted to other students to meet and discuss secular matters has a potential for impermissible political divisiveness. The decisions relied upon by the courts below had to do with divisiveness arising out of programs of gigantic favoritism towards religious institutions–not, as here, with fancied divisiveness arising out of a program of equality which extends to the spiritually inclined as well as to those whose interests are secular. This Court has never held or even hinted that religious speech or gatherings should be curtailed because to allow such expression or association might divide the community. To the contrary, the Court has many times said that "a function of free speech under our system of government is to invite dispute" (*e.g.*, *Edwards v. South Carolina* (1963), 372 U.S. 229, 237 [83 S. Ct. 680, 9 L. Ed. 2d 697]).

B. Assuming that the Establishment Clause is really involved in the issue set forth hereunder, the value of the rights sought to be protected by the Establishment Clause are outweighed by the value of other First and Fourteenth Amendment rights.

It is the contention of petitioners that in an ongoing program of a public school district which singles out student groups with religious interests and (solely on the basis of those religious interests) denies those groups recognition, the school system has denied the discriminated-against students

a wide range of their constitutional rights embraced by the First and Fourteenth Amendments.

Petitioners have hereinbefore replied that the Establishment Clause is not involved in the context of the case *sub judice,* and they now reply that assuming, *arguendo,* the existence of some relevance of the Establishment Clause to the case, the law is not such that the Establishment Clause values automatically override every other and all other constitutional values.

In *Meek v. Pittinger, supra,* 421 U.S. 349, 359, the most recent of the Supreme Court's Establishment Clause decisions, the Court states that its tripartite tests–

> "serve only as guidelines with which to identify instances in which the objectives of the Establishment Clause have been impaired. [Citation.] Primary among the evils against which the Establishment Clause protects 'have been "sponsorship, financial support, and active involvement of the sovereign in religious activities" [Citations]' ."

These three objectives of the Establishment Clause–prevention of government sponsorship of religion; prevention of government financial support of religion; and prevention of the sovereign becoming involved in religious activities–should be examined to show the maximum involvement of Establishment Clause *values* in this case when one has accepted, *arguendo,* the premise that the Establishment Clause is relevant:

1. There is absolutely no sponsorship involved. The students do not ask to be sponsored, they ask only to be tolerated. They ask to be tolerated to the extent of being allowed to meet during the lunch hour–when they are free

in every sense except being able to leave the campus or being able to meet to study the Bible–like the other students are allowed to meet. That this *can* be done without sponsorship is conclusively proved by the fact that it was done without sponsorship between January 8, 1974 and June 25, 1974 (Tr. p. 38, ll. 1 - 12; p. 56).

2. The principal "financial support" to religion is allowing these young people to use an otherwise unused room in the school for their religious discussion and study.[1] It is not unlikely that there would be an infinitesimal further increment (*e.g.,* for electricity) that a fastidious Disestablishmentarian would classify as "financial support." These are the things to be weighed on the constitutional scales against counterweights such as deprivation of freedom of association. The precise point which petitioners urge is that allowing religious meetings to happen on otherwise unused governmental park property was not the kind of "financial support" which would induce the United States Supreme Court to override the claims of Messrs. Saia, Kunz, and Niemotko without weighing their fundamental rights. Nor did the *de minimis* increment involving lighting expense deter the courts which decided *Keegan v. University of Delaware, supra,* 349 A.2d 14; *Reed v. Van Hoven, supra,* 237 F. Supp. 48, and *Stacy v. Williams, supra,* 306 F. Supp. 963, from considering constitutional rights as well as electric bills.

3. If there is any active involvement in religious activities involved in this situation, the involvement is

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[1]Somewhat in the manner suggested by Jefferson when he was Rector of the state-operated University of Virginia and approved by Madison, who was at that time a member of its Board of Visitors (see the opinion of Justice Reed, dissenting in *McCollum v. Board of Education, supra,* 333 U.S. 203, 245 ff.)

insignificant and involves the last paragraph. Announcements will be made that the views expressed at the meetings are not necessarily those of the school. If a faculty member must be present at the meetings, he or she will be involved in safety activity–not religious activity.

(a) Traditional First Amendment rights of free expression and assembly.

This Honorable Court has specifically, recently and unanimously ruled that the limitation or denial of the freedom of speech or assembly by a state university on the basis of a subject matter which is neither slanderous nor obscene is violative of the students' First Amendment rights. In *Healy v. James* (1972), 408 U.S. 169 [92 S. Ct. 2338, 33 L. Ed. 2d 266], a group of student activists (*i.e.*, the Students for a Democratic Society) at a Connecticut state college sought recognition as a student organization. The president of the college denied them recognition. The practical consequence of this action was summarized by the Court as follows (408 U.S. at p. 176):

> "Denial of official recognition posed serious problems for the organization's existence and growth. Its members were deprived of the opportunity to place announcements regarding meetings, rallies or other activities in the student newspaper; they were precluded from using various campus bulletin boards; and–most importantly–nonrecognition barred them from using campus facilities for holding meetings."

The Court held this to be a prior restraint of the First Amendment right of freedom of association, "denying to petitioners' organization the range of associational activities described above" (408 U.S. at p. 184). The language with which the Court described the constitutional violation bears repeating:

> "Among the rights protected by the First Amendment is the right of individuals to associate to further their personal beliefs. While the freedom of association is not explicitly set out in the Amendment, it has long been held to be implicit in the freedoms of speech, assembly, and petition. There can be no doubt that denial of official recognition, without justification, to college organizations burdens or abridges that associational right. The primary impediment to free association flowing from nonrecognition is the denial of use of campus facilities for meetings and other appropriate purposes." (408 U.S. at p. 181.)

There are many other decisions protecting student groups from non-recognition or facility denial because of their proposed activities, of which a few examples follow:

Hudson v. Harris (1973), 478 F.2d 244, 246:

> "The test to be applied is whether such an organization would substantially and materially interfere with the discipline necessary to operate the college."

American Civil Liberties Union v. Radford College (1970), 315 F. Supp. 893, 896:

> " . . . [O]nce a public school makes an activity available to its students, faculty, or even the general

public, it must operate the activity in accord with First Amendment principles."

Gay Students Organization v. Bonner (1974), 509 F.2d 652, 660:

" . . . [I]t is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, *religious* or cultural matters." (Emphasis added.)

Wood v. Davison (1972), 351 F. Supp. 543, 546:

"It is now clear that constitutional restraints on authorities apply on campuses of state supported educational institutions with fully as much sanction as public streets and in public parks."

Although the last cited case refers to "state supported educational institutions," which certainly includes high schools, the cases hereinabove relied on, beginning with *Healy v. James,* all took place at the college level. It remains to be shown that the same rules apply at the high school level.

Tinker v. Des Moines School District (1969), 393 U.S. 503 [89 S. Ct. 733, 21 L. Ed. 2d 731], is the fountainhead of constitutional law as it pertains to public high school students. That decision made a number of relevant observations, including:

"The principal use to which the schools are dedicated is to accommodate students during prescribed hours for certain types of activities. *Among those activities is personal intercommunication among the students.*" (P. 512; emphasis added.)

"Students in school as well as out of school are

'persons' under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State." (P. 511.)

"Clearly, the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible." (P. 511.)

(b) The right to the free use of a public forum, a modern penumbral right of constitutional dimension.

In 1972 this Court announced a constitutional right fashioned from First Amendment freedoms and the Equal Protection Clause, which has come to be known as the "freedom of a public forum." This unanimous decision (*Police Department of Chicago v. Mosley,* 408 U.S. 92 [92 S. Ct. 2286, 33 L. Ed. 2d 212]) involved a city ordinance which forbade picketing within 150 feet of a public school building except for picketing in connection with labor disputes. The defendant was convicted of carrying picket signs which accused a public school of racist policies. Because the ordinance discriminated against non-labor dispute picketing on the basis of subject matter, the Court invalidated the ordinance in these words (at pp. 96 - 97):

" . . . [U]nder the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose

views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities . . . Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say.

" . . . In *Niemotko v. Maryland,* 340 U.S. 268 (1951), a group of Jehovah's Witnesses were denied a permit to use a city park for Bible talks, although other political and religious groups had been allowed to put the park to analogous uses . . . [T]his Court held that the permit refusal violated '[t]he right to equal protection of the laws, in the exercise of those freedoms of speech and religion protected by the First and Fourteenth Amendments.' "

(c) Equal protection of the laws.

Although the constitutional right to freedom of a public forum has equal protection overtones, there are also cases which reach the same conclusion entirely upon pure Equal Protection Clause principles. In one of them a three-judge federal district court reviewed all the rules of the University of Mississippi which bore on the subject of outside speakers on campus (*Stacy v. Willaims* (1969), *supra,* 306 F. Supp. 963). Among the rules considered by the court, one had to do with religion and provided that facilities of the university "shall not be made available for public religious meetings or gatherings

to off-campus persons or groups of persons." The court invalidated the regulation, saying:

> "[Because] this regulation can reasonably be construed to mean that no student religious group may invite outside speakers on religious topics, which prohibition would conflict with the Equal Protection Clause, it must be rejected . . . . " (306 F. Supp. at pp. 975 - 976.)

Stacy v. Williams shows that "religion" is not a reasonable classification and that a state may not choose the broad classification of "religion" for exclusion in its public educational institutions and justify the classification on Equal Protection principles. To the contrary, "freedoms of speech and of press, of assembly, and of worship may not be infringed" on the "slender grounds" that the Fourteenth Amendment has been complied with in a general way (*Danskin v. San Diego Unified School Dist.*, 28 Cal. 2d 536, 550).

> "[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."
>
> *Schneider v. State* (1939), 308 U.S. 147, 163 [60 S. Ct. 146, 84 L. Ed. 155].

The practical realities are that if students are to communicate with students on *any* subject, they must do so where students come together: *at school!*

On one side of the scale is an empty school room. Being empty, it would hardly move the scale even if it were being balanced against nothing, especially since there is no governmental purpose other than to be fair, grant equality and give

an opportunity for student intercommunication. On the students' side of the scale there is to be weighed almost every one of the freedoms that are most valued by our nation's fundamental laws.

II

In The Context Of An Ongoing Program Of Recognizing Student Organizations And Granting Use Of School Facilities For Meeting And Communication Purposes, A School District Is Not Prohibited By The California Constitution From Granting The Same Privileges To A Student Group With Religious Interests As Are Granted To Student Groups With Secular Interests.

Two portions of the California Constitution were claimed by the Orange County Counsel to prohibit the Bible Study Club activities proposed by petitioners and their fellow students. These portions are:

> " . . . nor shall any sectarian or denominational doctrine be taught, or instruction thereon be permitted, directly or indirectly, in any of the common schools of this State."
>
> Article IX, Section 8.

> "Neither the Legislature, nor any county [or] . . . school district . . . shall ever . . . grant anything to or in aid of any religious sect, church, creed, or sectarian purpose. . . . "
>
> Article XVI, Section 5.

A. Article IX, Section 8, does not forbid the activities proposed by petitioners.

This particular state constitutional section employs the term "common schools." This term was chosen by the drafters of Article IX as a special term inclusive only of primary and grammar schools (*Los Angeles County v. Kirk* (1905), 148 Cal. 385, 389; Louisell and Jackson, *Religion, Theology and Public Higher Education* (1962), 50 Cal. L. Rev. 751, 769), and thus, by its own terms, this section is not applicable to high schools.

Even if the section applied to high schools, it applies only to "instruction" and things that are "taught." Without a very strained construction, these terms cannot apply to the intercommunication of ideas among students. And such intercommunication of ideas among students is natural in the high school setting. The obvious meaning of teaching and instruction in this constitutional section is a purely curricular one. There is no intention shown in the language of the section to prevent discussion among students about God. The section intends to restrict the permissible activities of the sovereign, not the permissible activities of individuals.

> " . . . there was no thought whatsoever in the minds of the framers of that document in opposition to or of hostility to religion as such. They proposed to insure separation of church and state and to provide that the power and authority of the state should never be devoted to the advancement of any particular sect or denomination."
>
> *Gordon v. Board of Education* (1947), 78 Cal. App. 2d 464, 472 - 473.

To single out religion as the only subject which may not be voluntarily and extracurricularly examined in the environment of the public schools is most certainly an act *hostile to religion.* Consequently, this becomes constitutionally impermissible.

B. Article XVI, Section 5, does not forbid the activities proposed by petitioners.

Prevention of active advancement by the sovereign of "any particular sect or denomination" was the main purpose of the California constitutional convention in setting forth "separation" provisions. Such provisions are clearly set out in the aforementioned case of *Gordon v. Board of Education.*

In contrast to the separation provisions, a reviewing court must address itself to the scope of involvement. The courts have consistently relied upon a theory of degree and "substantial advancement" of religion (*California Educational Facilities Authority v. Priest* (1974), 12 Cal. 3d 593). The act of the school authorities in granting equality to these students will not "substantially" advance religion. Neither would the granting of such equality give any aid whatsoever to a religious institution, and it is state aid to sects and to the sectarian to which Article XVI, Section 5, of the California Constitution addresses itself.

The Bible Study Club does not request the support of the school but, rather, a mere forum in which to exercise its constitutionally guaranteed rights. This type of activity is not restricted or forbidden by Article XVI, Section 5.

III

In The Context Of An Ongoing Program Of Recognizing Student Organizations And Granting Use Of School Facilities For Meeting And Communication Purposes, If Any Provision Of The California Law (Including The California Constitution) Purports To Prohibit A School District From Granting The Same Privileges To A Student Group With Religious Interests As Are Granted To Student Groups With Secular Interests, Such Provision Of California Law Violates The United States Constitution And Is Invalid.

The construction of the California Constitution as set forth by the Orange County Counsel must result in two sections of the California Constitution being in violation of the United States Constitution. The state cannot deny equal rights to the Bible Study Club simply because of its motive. This, in simple terms, is a violation of equality under the Equal Protection Clause of the Fourteenth Amendment.

The school district cannot grant to students of secular clubs the rights of expression and association, and yet deny those same rights to students of religious clubs.

Allowing the students to use a school room in which to meet and talk does not have the effect of directly or immediately or substantially advancing religion, any more than allowing such activities to take place in a public park (*Niemotko v. Maryland, supra,* 340 U.S. 268).

It is perfectly competent for the California Constitution and laws to "separate church and state" by limiting the permissible activities of the *sovereign.* It is not competent for that same Constitution or laws to limit otherwise permissible

and constitutionally protected activities of the *people* by singling out a subject matter as to which those activities are denied.

In light of this delineation, the California Constitution cannot set out religion as a suspect activity and deny certain rights to groups on that basis alone.

A. Such a provision would violate the Establishment Clause.

Not only may legislation not have the purpose or primary effect of advancing religion, it equally may not have the purpose or primary effect of *inhibiting* religion (*Abington School District v. Schempp, supra,* 374 U.S. 203, 222; *Committee for Public Education v. Nyquist, supra,* 413 U.S. 756, 773). There is not a great deal of legislation having the purpose or effect of inhibiting religion, so the rule is rarely litigated. However, the Federal Communications Commission was recently asked to place a "freeze" on all applications by religious groups seeking educational FM and TV channels. The Commission denied the petition on Establishment Clause grounds, saying:

> "As a government agency, the Commission is enjoined by the First Amendment to observe a stance of neutrality toward religion, acting neither to promote nor to inhibit religion."
>
> *In the Matter of Revision of Rules, etc.,*
> 54 F.C.C. 2d 941, 949.

Equally, the respondent school district is enjoined by the Establishment Clause to observe a stance of neutrality. It is the route of neutrality which the petitioners believe is intended by the California constitutional provisions. "Neutrality" means that the fact that a student group's interest is

religious neither is a reason for granting them recognition nor denying them recognition. A construction which requires denial of recognition simply because of a religious interest violates the Establishment Clause.

B. Such a provision would violate the Free Exercise of Religion Clause.

The two "religion" clauses of the First Amendment, under the circumstances now before the Court, do prevent the State of California–whether through its Constitution or otherwise–from forbidding in its schools the freedom of communication of religious thought–a form of freedom of religion–on the sole ground that it is religious in nature. The rule applied by the United States Supreme Court in Free Exercise situations is the same as that just described for Establishment Clause situations:

> " . . . [I]f the purpose or effect of a law is to impede the observance of one or all religions . . . that law is constitutionally invalid, even though the burden may be characterized as being only indirect."
>
> *Braunfeld v. Brown* (1961), 366 U.S. 599, 607 [81 S. Ct. 1144, 6 L. Ed. 2d 563].

That is precisely the construction of the California Constitution urged by those who would deny recognition to a student Bible Study Club on the sole ground of its religious nature. Their construction extends the effect of the California provisions beyond the control of what the sovereign can do, to the ultimate control of otherwise privileged activities of the *people,* and forbids the observance of religious communication. A construction which denies recognition to this Bible Study

Club violates the Free Exercise of Religion Clause.

C. Such a provision would violate the Freedom of Expression and Freedom of Association Clauses, the right to Free Use of a Public Forum, and the Equal Protection Clause.

Any case involving a fundamental freedom, as the case at bar, requires a balancing of the interests. In the "weighing" process between First Amendment rights and state laws which deny those rights, the scales do not start out evenly: the state must show a "compelling interest" to justify its denial of such fundamental rights.

> "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its validity."
>
> *Freedman v. Maryland* (1965), 380 U.S. 557 [85 S. Ct. 734, 13 L. Ed. 2d 649].

In broadening the quantitative definition of the state's burden, *Tinker v. Des Moines School District, supra,* 393 U.S. 503, offers a qualitative dimension particularly applicable to public high schools. The Court therein stated that when there is no finding and no state showing that exercise of fundamental constitutional rights would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," the prohibition of the exercise of those rights cannot be countenanced. There is no indication of such interference in the present case. But, beyond this, there is no indication that the California constitutional provisions have any relationship to the smooth running of the

school system.

Education, or the school experience, is much more than merely "that which the State chooses to communicate" (*Tinker, supra*). Any possible growth or advancement is stunted by such a limited scope. This, in and of itself, defeats the purpose of the educational experience –open communication.

If California can forbid its students to have organized discussions of religion in their free time, it can similarly forbid them to discuss the moral condition of government, the relationship of war in its various forms to compassion for humanity, or even the quality of food in the cafeteria. Schools will then no longer be places of freedom but places where freedom is taught to students who experientially know that it does not exist.

The means chosen by California to protect its "compelling state interest" must take the form which provides the least interference with the students' fundamental liberties. Even though a legitimate state interest is identifiable, a "significant encroachment upon associational freedom cannot be justified . . . " (*Kusper v. Pontikes* (1973), 414 U.S. 51, 58 - 59 [94 S. Ct. 303, 38 L. Ed. 2d 260]). Such means as chosen by the state may not "unnecessarily restrict [a] constitutionally protected liberty" (*Kusper, supra*).

Attention must be given to Equal Protection in this situation. The classification involved in this case is not reasonable. Merely because the treatment is the same with respect to all religious groups does not cleanse the classification.

> "Although an individual's right to equal protection does not deny the power to treat different classes

> of persons in different ways; it denies the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the statute."
>
> *Johnson v. Robinson* (1974), 415 U.S. 361, 374 [94 S. Ct. 1160, 39 L. Ed. 2d 389].

The objective of the student club program is to encourage the intercommunication of ideas among students on subjects of interest to the students. Religion is a subject of interest to many students. To remove it as a permissible subject of student intercommunication is to grant different treatment on the basis of criteria wholly unrelated to the objective of the student clubs program.

D. Board Rule 5144 and Staff Rule 5144 violate the Due Process Clause.[2]

The utter meaninglessness of these two rules make them void both for vagueness and overbreadth. If it is the contention of the respondent District that instructions subsequent to June 24, 1974, have made it clear that only religious clubs are not to be "sponsored" (and thus are to be denied existence), then the unfettered vagueness has been turned into outright censorship. Either way, due process is denied. Additionally, because of the utter lack of standards by which the schools should or should not grant "recognition" (*i.e.*, existence), the entire system is in itself an unconstitutional licensing

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[2]Board Rule 5144 is set forth in footnote 2 of the opinion of the California Court of Appeal (Appendix p. 2), and Staff Rule 5144 is set forth in footnote 3 thereof (Appendix pp. 2 and 3).

system. (*Jones v. Board of Regents* (1970), 436 F.2d 618, 621.)

CONCLUSION

Perhaps the solution of the whole Establishment Clause issue lies in the fact that before there can be an Establishment Clause violation there must be some "state action"–a term used in several constitutional contexts.

The first decision to hold that the Establishment Clause is binding upon the states was *Everson v. Board of Education* (1947), 330 U.S. 1 [67 S. Ct. 504, 91 L. Ed. 711]. In *Everson* a New Jersey taxpayer attacked a New Jersey statute which allowed school districts to reimburse the parents of all children within the district (including those whose children attended parochial schools– for their expenditures in sending the children to school on buses operated by the public transportation system. After holding the Establishment Clause to be applicable, the Court upheld the New Jersey statute, saying (at p. 18):

> "The Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them."

It is urged that many fundamental constitutional rights are being violated under the misapplication of the Establishment Clause, and the respondent District has failed to take into account the value of the constitutional rights of these students for no higher a reward than that an empty school room (not "classroom") can be kept empty.

For the foregoing reasons, petitioners respectfully pray that the issues herein raised be given consideration by this Honorable Court and that this petition for writ of certiorari be granted.

Respectfully submitted,

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INDEX TO APPENDIXES

Appendix		Page
"A"	Opinion and Dissent of the Court of Appeal of the State of California, Fourth Appellate District, Second Division	1
	(Dissent)	19
"B"	Denial of Petition for Rehearing in the Court of Appeal of the State of California, Fourth Appellate District, Second Division	45
"C"	Denial of relief from default (letter dated April 25, 1977, from the office of the Clerk, Supreme Court of California)	46
"D"	Petition Requesting Court To Grant Hearing On Its Own Motion, Pursuant To California Rules of Court, Rule 28(a), And Declaration In Support Thereof. Points and Authorities. Stamped "Received May 6, 1977, Clerk, Supreme Court" [of California]	48
"E"	Letter dated May 12, 1977, from the office of the Clerk, Supreme Court of California, ignoring above petition and refusing to hear the matter on its own motion	51

APPENDIX "A"

OPINION AND DISSENT OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

CERTIFIED FOR PUBLICATION

In the Court of Appeal, Fourth District, Second Division, State of California.

BRUCE JOHNSON, et al., Plaintiffs and Appellants, v. HUNTINGTON BEACH UNION HIGH SCHOOL DISTRICT, et al., Defendants and Respondents.

4 Civil 15738. (Sup. Ct. No. 228389).

[FILED MAR 11 1977]

APPEAL from a judgment of the Superior Court of Orange County. Lloyd E. Blanpied, Jr., Judge. Judgment affirmed.

Christopher Hall and Kenneth Roberts for Plaintiffs and Appellants.

Rutan & Tucker and David C. Larsen for Defendants and Respondents.

Anti-Defamation League of B'Nai B'Rith and David A. Lehrer as Amici Curiae on behalf of Defendants and Respondents.

Plaintiffs (high school students) sought judicial relief from a refusal of the Huntington Beach Union High School District (district) to permit a voluntary student Bible study club to meet and conduct its activities on the school campus during the school day. The trial court sustained the district's action and denied plaintiffs the relief sought.

The operative facts set forth in the stipulated facts on which the cause was heard and submitted may be summarized as follows: The district is charged with supervising and establishing rules and regulations for high schools within the district. Plaintiffs are students at Edison High School, a public tax-supported secondary school under the jurisdiction of the district.

Pursuant to statutory authority,[1] the district has provided for recognition of student clubs[2] and has prescribed regulations under which such clubs may operate on high school campuses.[3] Under the district's rules, student organ-

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[1]See Education Code sections 10701, 10702, 10704, 10604, 1052.

[2]The district's "Policy No. 5144" reads:

"Clubs recognized by the board of trustees are those which are sponsored by the individual schools of the district. Clubs shall be responsible to the school through which they are organized. Such clubs may not be secret for, as indicated in the Education Code, it is 'unlawful for any pupil enrolled in any elementary or secondary school in the state to join or become a member of any secret fraternity, sorority or club wholly or partly formed of pupils attending the public schools, or to take part in the organization or formation of any such fraternity, sorority or club . . . . ' "

[3]The regulations implementing the district's policy on student clubs are set forth in "Staff Rule No. 5144," which reads:

"Clubs

"School Sponsored

"Clubs Recognized

"Clubs recognized by the individual school will be those sponsored by the school. These clubs must be directly responsible to the school.

"Charters

"The organization's charter must be approved by Associated Students' governing body and *by the Principal of the school.*

"Membership

"Membership must be limited to the students attending the school, and must be open to all students who meet the qualifications and standards of membership set forth in the club charter.

"Charter Filing

A copy of the charter must be on file in the Principal's office.

"The organization must:

"1. Be sponsored by a member of the faculty appointed by the Principal.

"2. *Deposit all monies* collected and *check out* all monies through the school's financial secretary according to school regulations. All club accounts shall be audited.

"3. Have the approval of the sponsor for the time and place and all activities carried on by the organization, including regular meetings. The sponsor must be present at all meetings.

izations may not have free use of classrooms or school facilities other than by applying for and receiving recognition, i e , official approval to operate on the campus as a student club. For many years the district has permitted and still permits high schools under its jurisdiction to grant recognition to student clubs and to permit such clubs to use classrooms and other spaces for club meetings and to publicize their activities through the school newspaper and school bulletin boards. The district did not, however, permit student religious clubs to meet on the school campus during the school day.[4]

On January 8, 1974, the district passed an interim policy resolution permitting student religious clubs to meet on campus during the school day pending legal clarification from the

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(3 cont'd)

"4 Request and receive approval from the school Principal for special social events.

"School-sponsored clubs may be permitted

"1. to use official name of the school

"2. to use building and other facilities

"3 to have publicity in daily bulletins, bulletin boards and school publications.

"4. to wear identifying emblem but not special clothing

"5 to sell on school premises tickets or bids to special activities sponsored by the club

"Deviations

"Deviations from any of the requirements may be made only with the approval of the Associated Students' governing body and the school Principal.

"Private Clubs

"No off-campus or private clubs are permitted to function in the school They are also restricted from advertising in any form.

"Secret Clubs

"Education Code, Section 16075 [now section 10604], makes it 'unlawful for any pupil enrolled in any elementary or secondary school to join or become a member of any secret fraternity, sorority, or club wholly or partly formed of pupils attending the public schools, or to take part in the organization or formation of any such fraternity, sorority, or club . . . ' "

"Obligation of the Principal

"It is the obligation of the Principal to see that the clubs and organizations of the school are not of secret nature and that they are not in any way selective or discriminatory " (Original emphasis)

[4]It was stipulated that students, as well as members of the community, may apply for use of school facilities under the Civic Center Act (Ed Code, § 16551 et seq.) but that the district would not grant an application under the act by a student group to use classrooms or other meeting rooms for religious purposes during the school day.

Orange County Counsel and the Attorney General. The County Counsel informed the district that it could not constitutionally permit student religious clubs to meet on the campus during the school day Consequently the district rescinded its interim resolution and reinstated its long-standing policy of denying recognition to student religious groups. Subsequently the Attorney General also rendered an opinion supporting the conclusion of the County Counsel and the action taken by the district. (59 Ops. Cal. Atty. Gen. 214.)

Over 100 Edison High School students responded to the district's action with a written application seeking formal recognition of a club whose express purpose was "to enable those participating to know God better . . . by prayerfully studying the Bible" and whose membership would be open only to those who "have a genuine interest in the fulfilling of the purpose of this organization."[5] School officials at Edison High rejected the petition and the district's board of trustees did likewise.

Plaintiffs filed suit for injunctive and declaratory relief to establish their claimed rights to official club recognition, to use school classrooms and other space during the school day for club meetings, to use bulletin boards and similar facilities for the posting of club activities, and to have access to the school newspaper for purposes of publicizing club events. The cause was heard on the pleadings and stipulated facts. Following argument and submission, the trial judge rendered an intended decision that school recognition of plaintiffs' Bible study club would impermissibly advance

[5]The term "Bible" as used in the club's constitution refers to the 66 books collectively referred to as the Old and New Testaments.

religion and would cause the state to penetrate the federal and state constitutional barriers between church and state.[6] Judgment was entered decreeing that the district was prohibited from recognizing plaintiffs' Bible study club or from assisting plaintiffs in their efforts to form a religious club and that the school's posture of nonrecognition did not violate plaintiffs' free exercise or other First Amendment guarantees Plaintiffs appeal from that judgment

Plaintiffs do not challenge either the district's authority to promulgate rules for the operation of student clubs on campus or the validity of the existing rules.[7] They attack the judgment below on the ground that there are no federal or state constitutional proscriptions against school authorities permitting plaintiffs' Bible club to meet and conduct its activities on campus during the school day on the same footing as other student clubs and that refusal to grant such permission violates plaintiffs' First and Fourteenth Amendment rights From the analysis which follows, we have concluded that the issues were correctly resolved by the trial court and that the judgment should be affirmed.

The First Amendment to the United States Constitution provides in relevant part: "Congress shall make no

[6]Findings of fact and conclusions of law were not requested by either party and none were made.

[7]The entire thrust of plaintiffs' suit in the court below was that they were entitled to recognition of their club and to the use of school facilities under the district's regulations on the same basis and to the same extent as are enjoyed by other student organizations They made no attack on the validity of the regulations themselves For the first time on appeal plaintiffs assert that the regulations are void for "vagueness and overbreadth" and for lack of "standards," but they fail to point out in what particulars the regulations are vague or overbroad or lack adequate standards Failure to support a point by legal argument and discussion may be deemed an abandonment of the contention (*Huntington Beach Police Officers Assn. v. City of Huntington Beach*, 58 Cal App 3d 492, 504)

law respecting an establishment of religion, or prohibiting the free exercise thereof . . . . " In erecting a wall of separation between church and state, the framers of our Constitution acted upon the belief " 'that a union of government and religion tends to destroy government and to degrade religion.' [Citation.] When government . . allies itself with one particular form of religion, the inevitable result is that it incurs 'the hatred, disrespect and even contempt of those who held contrary beliefs.' " (*Abington School District v. Schempp*, 374 U.S. 203, 221-222 [10 L.Ed.2d 844, 83 S.Ct. 1560] quoting *Engel v. Vitale*, 370 U.S. 421, 431 [8 L.Ed.2d 601, 82 S.Ct. 1261].) Provisions of the First Amendment, including the Establishment Clause, are subsumed under the Due Process Clause of the Fourteenth Amendment and govern state action. (*Committee for Public Education v. Nyquist*, 413 U.S. 756, 760, fn. 2 [37 L.Ed.2d 948, 93 S.Ct. 2955].)

Preservation of religious liberty and the maintenance of governmental neutrality have undergone their severest test in the context of religious exercises within school corridors. In quick succession the Supreme Court of the United States passed upon two "release time" programs which were challenged as violative of the Establishment Clause. *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203 [92 L.Ed.649, 68 S.Ct. 461], put before the court a program whereby the school turned over its classrooms during the school day to religious groups which, one day a week for 30 minutes, substituted religious training for the secular education provided under the compulsory education law. The court held that the use of tax-supported property for religious instruction during a time

when students were compelled by law to attend school resulted in the state becoming an active participant in religious affairs and thereby violated its constitutonal obligation of neutrality. (333 U.S. at pp. 209-210.)

Sensitive to the religious needs of its pupils but cognizant of its constitutional duties, New York devised a release time program whereby students were released from school to receive spiritual training at the church of their belief. Students were released only upon written request of their parents; those not released remained in the classroom. This program withstood constitutional scrutiny in *Zorach v. Clauson*, 343 U.S. 306 [96 L. Ed. 954, 72 S. Ct. 679; Justices Black, Jackson and Frankfurter dissenting].) The court noted that while it is the philosophy of the First Amendment to erect a citadel where neither state nor church would invade the precinct of the other, not all cooperation between the secular and the religious is condemned. (343 U.S. at pp. 312-313.) As much as the state must remain neutral in the affairs of religion, neither can it assume a posture of hostility. (343 U.S. at pp. 313-314.) Thus, a course of accommodation involving nothing more than school officials adjusting educational schedules to meet sectarian needs of its students was found consistent with constitutional precepts. (343 U.S. at p. 314.)[8]

A state policy of accommodation, however, can overstep constitutional limits and become an impermissible form of aid to religion. In *Abington School District v. Schempp, supra*, 374 U.S. 203, school officials instituted a practice whereby passages of the Bible were read without comment at the

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[8]The area of accommodation has been explored by noted commentators (See Religion and the Public Order (edited by Giannela, 1963) pp. 17-23; Kauper, *Prayer, Public Schools and the Supreme Court* (1963) 61 Mich. L. Rev. 1031, 1066-1068.)

beginning of each school day. Those students not wishing to participate were permitted to absent themselves. The court noted that although our heritage and culture is in part grounded in the belief in the almighty (374 U.S. at pp. 212-213), the Constitution mandates governmental neutrality which neither prefers one religion over another nor advances all religion but instead creates a sanctuary where all religions may flourish without governmental interference. (374 U.S. at pp. 217-219.) Governmental neutrality and religious freedom, the court observed, can be preserved only by the segregation of secular activity from religious pursuit through the banishment of all governmental allegiance with religion. (374 U.S. at pp. 216-217.) The court concluded that state sponsorship of Bible reading during the school day violated the principle of neutrality, placed the state behind religious inculcation and infringed the free exercise rights of nonbelievers. (374 U.S. at pp. 222-227; see also: *Engel v. Vitale, supra,* 370 U.S. 421 [prohibiting the recitation of prayer at the beginning of the school day].)

In *Lemon v. Kurtzman,* 403 U.S. 602, 612-613 [29 L. Ed.2d 745, 91 S.Ct. 2105], the high court announced a tripartite test, synthesized from criteria developed by prior decisions, for determining whether state action involves a violation of the Establishment Clause. To pass constitutional muster the state activity must satisfy three conditions: (1) It must have a secular legislative purpose; (2) its primary effect must neither advance nor inhibit religion; and (3) it must not foster excessive governmental entanglement with religion. (See also: *Meek v. Pittenger,* 421 U.S. 349, 358 [44 L.Ed.2d 217, 95 S.Ct. 1753] [upholding school textbooks

loans to nonpublic school children but invalidating loans of other instructional material made directly to nonpublic schools]; *Committee for Public Education v. Nyquist, supra,* 413 U.S. 756, 772-773 [invalidating a system of tax credits and tuition reimbursements to low income families who sent their children to nonpublic schools].) Failure to meet any one of the three conditions is fatal to the constitutionality of state action. (See e.g., *Committee for Public Education v. Nyquist, supra; Lemon v. Kurtzman, supra; Abington School District v. Schempp, supra,* 374 U.S. 203.)

No test, however, can be applied with precision in determining where the line between church and state should be drawn; the problem, like many in constitutional adjudication, is one of degree. (*Zorach v. Clauson, supra,* 343 U.S. at p. 314.) The high court has cautioned that the tripartite *Lemon* test is to be viewed, not as a formula prescribing the precise scope of constitutional inquiry, but as a touchstone with which to identify instances where the objectives of the Establishment Clause have been compromised. (*Meek v. Pittenger, supra,* 421 U.S. 349, 358-359.) The primary evils the Clause was intended to protect against are "sponsorship, financial support, and active involvement of the sovereign in religious activity." (E.g., *Meek v. Pittenger, supra,* at p. 359; *Lemon v. Kurtzman, supra,* 403 U.S. 602, 612; *Walz v. Tax Commission,* 397 U.S. 664, 668 [25 L.Ed.2d 697, 90 S. Ct. 1409].) We proceed to apply the foregoing precepts to the case at bench.

The precise question we must decide is whether school officials of a tax-supported high school of the district may permit plaintiffs' Bible study club to meet and conduct its activities on the school campus during the school day under regulations governing student clubs. The administrative action

which plaintiffs seek would constitute state action and as such must withstand constitutional scrutiny under the guidelines enunciated in *Lemon v. Kurtzman, supra,* 403 U.S. 602.

To the extent that the first prong of the tripartite test may be applicable it is only necessary to observe that the exercise of the power to permit student organizations to conduct their activities on school campuses during the school day in accordance with district rules and regulations is in the abstract secular in nature.

However, in adjudging whether the "primary effect" of the state action sought by plaintiffs advances religion, we must examine its consequence not in the abstract but as applied to the Bible study club. (See *Hunt v. McNair,* 413 U.S. 734, 742 [37 L. Ed.2d 923, 93 S. Ct. 2868].) In this regard, the Supreme Court has cautioned that the crucial inquiry is not whether some benefit accrues to a religious institution as a consequence of state action, but whether its primary effect advances religion. (*Tilton v Richardson,* 403 U.S. 672, 679 [29 L. Ed. 2d 790, 91 S. Ct. 2091].) Aid may be said to have an impermissible primary effect of advancing religion "when it funds a specifically religious activity in an otherwise substantially secular setting." (*Hunt v. McNair, supra,* at p. 743; *Meek v. Pittenger, supra,* 421 U.S. 349, 365-366.)

Plaintiffs do not dispute the fact that the club's mission, "to enable those participating to know God better so that they will be better persons . . . by prayerfully studying the Bible," is religious in nature. It is also apparent that if the club is permitted to meet and conduct its activities on the school campus as a student club as demanded by plaintiffs, state financial support would flow

directly to the club. It would be entitled to use classroom space rent free, receive heat and light and would be monitored by a paid faculty sponsor. The district would also be obligated at its expense to audit club finances.[9] One of the factors differentiating *McCollum* from *Zorach* was the free use of school facilities, classrooms, heat and light. (*Zorach v Clauson, supra,* 343 U.S. 306, 308-309.) Thus this financial subsidy alone may be sufficient to compel constitutional condemnation of the requested state action.

We do not rest our decision, however, on financial aid alone.[10] The "primary effect" test bespeaks not only of financial assistance but also necessarily inquires whether the consequence of state action is to place its imprimatur upon the religious activity. (*Abington School District v Schempp, supra,* 374 U.S. 203, 216-219, 221-222; *Engel v. Vitale, supra,* 370 U.S. 421, 430-536. See also: *Reed v Van Hoven, supra,* 237 F. Supp. 48, 51-53.) This aspect of the effect test reaches the essence of the Establishment Clause proscription. In *Abington School District v Schempp, supra,* the court cogently observed: " 'The [First] Amendment's purpose was not to strike merely at outlawing only a formal relation such as had prevailed in England and some of the colonies. Necessarily it was to uproot all such relationships. But the object was broader than separating church and

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[9] See footnote 13, *infra.*

[10] There are advocates of the view that mere use of school property alone is not offensive to the Constitution so long as the religious activity is wholly separate from the official school day. (See, e.g., *Wood v. Mt. Lebanon Township School District* (W. D. Pa. 1972) 342 F. Supp. 1293, 1295; *Reed v. Van Hoven* (W. D. Mich. 1965) 237 F. Supp. 48, 54-57; *Keegan v. University of Delaware* (Del. 1975) 349 A.2d 14, 17-18; *Lawrence v. Buchmueller* (1963) 243 N.Y.S.2d 87, 88-90; but see: *Hunt v. Board of Education of County of Kanawha* (S.D. W.Va. 1971) 321 F. Supp. 1263, 1266.)

state in this narrow sense. It was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion.' " (374 U.S. 203, 217, quoting *Everson v. Board of Education*, 330 U.S. 1, 31-32 [Rutledge, J. dissenting].) The point is that impermissible governmental support is present when the weight of secular authority is behind the dissemination of religious tenets.

It is in the foregoing respect that permitting plaintiffs' Bible study club to meet and operate on the school campus during the school day most offends establishment principles. Under the district's rules and regulations, the club will become an entity "sponsored by the school" and as such will be entitled to use the school name in connection with its activities, to free use of school premises and property, to access to the school newspaper and school posting facilities to advertise its activities, and to solicit contributions on campus during the school day. Thus, the consequence of permitting the club to operate on campus as a recognized student organization is to place school support and sponsorship behind the religious objectives of the club. The Bible study club would implicitly become an integral part of the school's extracurricular program conducted during the school day[11] when students are compelled by law to attend the school.

The state action which plaintiffs seek would also run afoul of the third prong of the *Lemon* test. The school would be required to supply a "faculty sponsor" who would

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[11] Plaintiffs concede that the lunch hour during which the club proposes to meet is an inseparable part of the school day. (See statutory authorities cited at fn 12, *infra*.

be required to attend all club functions and approve all club activities.[12] The school would also be required to audit the club's financial accounts[13] and review membership procedures to ensure they are neither secret nor discriminatory.[14] Thus, permitting the Bible study club to operate on campus would foster excessive state entanglement with religion.

An additional factor which cannot be ignored in the context of the Establishment Clause is the potential for divisiveness in matters of religion which the requested state action to be evaluated may engender. (*Committee of Public Education v. Nyquist, supra*, 413 U.S. 756, 797-798; *Lemon v. Kurtzman, supra*, 403 U.S. 602, 622. See also: *Abington School District v. Schempp, supra*, 374 U.S. 203, 298 [concurring opinion of Justice Brennan].) Students who are members of less orthodox religions may be unable to organize a club because of insufficient student support or unavailability of a faculty sponsor. In such event, the free exercise rights of the minority might well be infringed by the pressure upon them to conform to the beliefs of the recognized religious club. Even if we assume that the spectrum of religious beliefs present in the national community is represented at the school,

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[12] A school district is required to maintain supervision over the conduct of its pupils during school hours, including recesses and lunch hours. (Ed. Code, § § 13557, 13557.5; 5 Cal. Admin. Code, § 303; *Taylor v. Oakland Scavengery Co.*, 17 Cal. 2d 594, 600.) Even if a nonfaculty assumes this function, provision is made for his reimbursement. (Ed. Code, § 20801.)

[13] Education Code section 10704 provides:
"The governing board of any school district shall provide for the supervision of all funds raised by any student body or student organization using the name of the school.
"The cost of supervision may constitute a proper charge against the funds of the district.
"The governing board of a school district may also provide for a continuing audit of student body funds with school district personnel."

[14] Education Code section 10604 prohibits pupil membership in secret clubs.

there is a real possibility that competing sects or beliefs will vie for school permission to operate on campus. Manifestly this could engender student divisiveness in matters of religious beliefs.

In sum, the school machinery implicated in permitting the student Bible study club to meet on campus under the district's rules and regulations goes far beyond the accommodation endorsed in *Zorach*. There the school cooperated with religious institutions only to the extent of adjusting its schedule to make it possible for the students who wished to do so to repair to their respective houses of worship to partake in religious activities off campus. The teachers did not sponsor, participate in, or monitor the religious function. Religion must be a private matter wholly untouched by state involvement or sponsorship. (*Lemon v. Kurtzman, supra,* 403 U.S. 602, 625.) The school permission sought by plaintiffs would meld the secular with the sectarian and would empower the Bible study club members to use the prestige and authority of the school in proselytizing their beliefs among students whose presence on the campus is compelled by law and who may be vulnerable to the pressure of an officially recognized student religious organization. This, the First Amendment will not permit.

To this point we have concerned ourselves only with the federal Establishment Clause. However, section 4 of article 1 of the California Constitution contains an Establishment Clause identical to that of the First Amendment to the federal Constitution.[15] For all of the reasons heretofore stated, we

[15]Section 4, article 1 of the California Constitution revised November 5, 1974, provides:

"Free exercise and enjoyment of religion without discrimination or preference are guaranteed. This liberty of conscience does not excuse acts that are licentious or inconsistent with the peace or safety of the State. The Legislature shall make no law respecting an establishment of religion."

hold that the state action in question is proscribed by the Establishment Clause of the state Constitution.

Furthermore, section 5 of article 16 of the California Constitution also compels us to uphold the school district's action. The section provides in relevant part: "Neither the Legislature nor any . . . school district . . . shall ever make an appropriation, or pay from any public fund whatever, or grant anything to or in aid of any religious sect, church, creed, or sectarian purpose. . . ."[16] In *California Educational Facilities Authority v. Priest,* 12 Cal. 3d 593, the court observed: "The section thus forbids more than the appropriation or payment of public funds to support sectarian institutions. It bans any official involvement, whatever its form, which has the direct, immediate, and substantial effect of promoting religious purposes." (At p. 605, fn. 12.) As we have explained, permitting the club to operate on campus implicates school authority and prestige behind the dissemination of religious dogma. This benefit cannot be viewed as "incidental to a primary public purpose." (12 Cal. 3d at p. 605.) Indeed the primary purpose to be served by permitting the club to operate on campus as a student organization is to promote sectarian tenets, an intrinsically religious function. We are, therefore, compelled to conclude that the California Constitution will not suffer school officials to permit plaintiffs'

(15 cont'd)

[16]Article 9, section 8 of the state Constitution provides in pertinent part:

"No public money shall ever be apportioned for the support of any sectarian or denominational school . . . nor shall any sectarian or denominational doctrine be taught, or instruction thereon be permitted, directly or indirectly, in any of the common schools of this State."

In view of our holding that article 16, section 5 of the state Constitution proscribes school recognition of plaintiffs' club, we find it unnecessary to chart the limits and sweep of article 9, section 8's proscription.

Bible study club to meet and conduct its activities on school campus during the school day.

Plaintiffs argue that refusal to permit their club to operate on the campus on the same footing as other student clubs infringes upon rights guaranteed to them under the First and Fourteenth Amendments of the United States Constitution. The argument must be rejected. The Free Exercise Clause of the federal Constitution embodies two rights: Freedom to believe and freedom to act. "The first is absolute but, in the nature of things, the second cannot be." (*Cantwell v. Connecticut*, 310 U.S. 296, 303-304 [84 L. Ed. 1213, 60 S. Ct. 900].) Under the Free Exercise Clause, freedom of conscience and freedom to adhere to such religious organizations or beliefs as the individual may choose is secured against governmental interference. (*Cantwell v. Connecticut, supra*.) This is not to say, however, that religion may be exercised wherever and whenever the adherent chooses. (*Wisconsin v. Yoder*, 406 U.S. 205 [32 L. Ed. 2d 15, 92 S. Ct. 1526]; *Poulos v. New Hampshire*, 345 U.S. 395, 405 [97 L. Ed. 1105, 73 S. Ct. 760]; *Cantwell v. Connecticut, supra*, 310 U.S. 296.) The inevitable consequence of the Establishment Clause when applied to religious ritual on school property[17] is to restrict that activity

[17] Plaintiffs' reliance upon *Saia v. New York*, 334 U.S. 558 [92 L. Ed. 1574, 68 S. Ct. 1148]; *Kunz v. New York*, 340 U.S. 290 [95 L. Ed. 280, 71 S. Ct. 328], and *Niemotko v. Maryland*, 340 U.S. 268 [95 L. Ed. 267, 71 S. Ct 312], which sanctioned the use of public parks as a forum for religious teaching is misplaced. The public school is organized " 'on the premise that secular education can be isolated from all religious teaching so that the school can inculcate all needed temporal knowledge and also maintain a strict and lofty neutrality as to religion.' " (*Abington School District v. Schempp, supra*, 374 U.S. 203, 218, quoting *Everson v. Board of Education, supra*, 330 U.S. 1, 23-24 [Jackson, J. dissenting].) Justice Stewart in his dissent in *Schempp* also noted the unique circumstances of religious exercise on school property: "Our decisions make clear that there is no constitutional bar to the use of government property for religious purposes. On the contrary, this Court has consistently held that the discriminatory barring of religious groups from public property is itself a violation of First and Fourteenth Amendment guarantees. [Citations.] A different standard has been applied to public school property, because of the coercive effect which the use by religious sects of a compulsory

to preserve the wall between church and state. " 'Our constitutional policy . . . does not deny the value or the necessity for religious training, teaching or observance. Rather it secures their free exercise. But to that end it does deny that the state can undertake or sustain them in any form or degree. For this reason the sphere of religious activity, as distinguished from the secular intellectual liberties, has been given the two fold protection and, as the state cannot forbid, neither can it perform or aid in performing the religious function. The dual prohibition makes that function altogether private.' " (*Abington School District v. Schempp, supra*, 374 U.S. 203, 218-219, quoting from *Everson v. Board of Education, supra*, 330 U.S. 1, 52 [Rutledge, J. dissenting].)

This is not a case where plaintiffs are denied access to all public forum for religious expression; they are merely being denied use of school property during the school day for religious purposes. This deprivation in no way infringes upon their religious rights when practiced outside the confines of the school. Plaintiffs are only being denied religious expression in a manner involving state participation. Each club member remains free to believe and express his religious beliefs on an individual basis and the students' Bible study club is free to meet as such off campus outside of school hours. There is no infringement of plaintiffs' free exercise rights except to the limited extent made necessary by the

(17 cont'd)
school system would necessarily have upon the children involved. [Citation.]" (*Abington School District v. Schempp, supra*, 374 U.S. at p. 314.) It cannot be said, therefore, that the power of the state to sanction religious practice on its property applies with equal force to all governmental property, irrespective of the nature of the property and governmental involvement resulting from such use.

Establishment Clause of the state and federal Constitutions.[18]

Judgment is affirmed.

CERTIFIED FOR PUBLICATION.

TAMURA,
J.

I concur:

GARDNER,
P. J.

[18] For cases in other jurisdictions holding that the Free Exercise Clause is not violated by denying religious adherents use of school property, see: *Stein v. Oshinsky* (2d Cir. 1965) 348 F.2d 999, 1001-1002 [cert. den., 382 U.S. 941]; *Hunt v. Board of Education of County of Kanawha* (S.D. W.Va. 1971) *supra*. 321 F. Supp. 1263, 1265-1266.

[DISSENT]

CERTIFIED FOR PUBLICATION

I dissent.

Before setting down the reasons for my disagreement with the majority, I respectfully note that it is necessary to amplify the recitation of facts which brought this litigation before us.

The proceedings in the trial court were based upon an agreed statement of facts tendered over the stipulation of counsel. Paragraph 18 of that stipulation stated: "The District's Board of Trustees has never issued to the individual schools any written instructions, guidelines or other writing purporting to define, describe or set forth any criteria as to what is meant by a club being 'sponsored' by an individual school as the word 'sponsored' is used in the provision of Board Policy No. 5144 that 'Clubs recognized by the board of trustees are those which are sponsored by the individual schools of the district.' Neither has the District issued any such written instructions, guidelines or other writing with the exceptions of Board Policy No. 5144 itself (Exhibit A to this Stipulation) and Staff Rule No. 5144 (Exhibit B to this Stipulation)."[1]

Paragraph 19 of that stipulaton stated: "Except as set forth in paragraph 20, below, there is no manner in which groups of students at a high school in the Huntington Beach Union High School District can regularly have use of rooms or other space at such high school apart from applying for

[1] Board Policy No. 5144 and Staff Rule No. 5144 are quoted in the majority opinion.

recognition as a student club."

Paragraph 20 of that stipulation stated: "A student or other members of the community may apply through the Civic Center Act[2] for use of school facilities as prescribed by law. The rules of the District respecting applications for use of school facilities under the Civic Center Act are attached hereto as Exhibit G and by this reference are made a part hereof."

Paragraph 21 of that stipulation stated: "The District would not grant an application made under the Civic Center Act by a group of students if the application requested use of rooms or other meeting space at a high school, if the purpose of the meeting was to enable the participating students to prayerfully study the Bible for the intended purpose of knowing God better so that they will be better persons, and if the meeting was proposed to be held at any time during the school day (i.e., at any time between the time that students are first required to report their attendance in the morning until the last class is dismissed in the afternoon)."

From a reading of Paragraph 18 of the stipulation, it can be fairly observed that the statement of the majority that "the consequence of permitting the club to operate on campus as a recognized student organization is to place school support and sponsorship behind the religious objectives of the

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[2]The Civic Center Act refers to section 16556 of the Education Code which reads:

"There is a civic center at each and every public school building and grounds within the state where the citizens, parent-t[illegible]hers' association, Camp Fire Girls, Boy Scout troops, farmers' organizations[illegible]ol-community advisory councils, senior citizens' organizations, clubs, and asso[illegible]ations formed for recreational, educational, political, economic, artistic, or moral activities of the public school districts may engage in supervised recreational activities, and where they may meet and discuss, from time to time, as they may desire, any subjects and questions which in their judgment appertain to the educational, political, economic, artistic, and moral interests of the citizens of the communities in which they reside. Governing boards of the school districts may authorize the use, by such citizens and organizations of any other properties under their control, for supervised recreational activities."

club" is not necessarily dictated by the facts. Similarly, it is not the necessary result of the stipulated facts that "[t]he school permission sought by plaintiffs would meld the secular with the sectarian and would empower the Bible study club members to use the prestige and authority of the school in proselytizing their beliefs among students whose presence on the campus is compelled by law and who may be vulnerable to the pressure of an officially recognized student religious organization." To state that club members would use the prestige and authority of the school in proselytizing their beliefs exceeds the stipulation of facts, and, as speculation, is not the inevitable result to be expected if the plaintiffs' club were allowed to meet on the school premises.

The purpose for expanding the factual predicate, as disclosed by the record, beyond that upon which the majority opinion is based is to question, if recognition sought were granted, whether there would be "secular authority . . . behind the dissemination of religious tenets." Putting it plainly, how can the court presume to announce the factual consequences of what "recognition" and "sponsor" mean when the defendant school district has not itself done so during the approximately 15 years that the policy and rule have been in effect?

For instance, it could just as logically be argued that the factual purpose for having a "sponsor" present would be for disciplinary and safety reasons and for other aspects of pupil citizenship such as are implied in Board Policy No. 5144 where it is indicated that "[c]lubs shall be *responsible* to the school through which they are organized." (Emphasis added.)

Otherwise, before turning to a discussion of the legal

precepts invoked by the majority, it is also significant to pay heed to the limitations upon the free expressions of the plaintiffs represented by the circumstances disclosed in paragraphs 19, 20, and 21 of the agreed statement of facts. The net result of the circumstances there recited, coupled with the present refusal to recognize the plaintiffs' club, is that there is no way whatsoever that plaintiffs can gather during school hours on school property to give verbal expression to their religious views and beliefs. This proscription applies under the majority view, notwithstanding that other groups of students gathering together on school property during school hours, do have their rights recognized under the Free Expression Clause of the First Amendment, United States Constitution, provided their subject of discourse is recreational, educational, political, economic, artistic, moral, or even agnostic. (See Ed. Code, § 16556.)

Proceeding from this addendum to the factual statement of the majority, and in terms of marshaling the precedents, there are two grounds, equally and independently valid in my view, on which I venture to dispute the majority result. The first is that the Establishment Clause, First Amendment, United States Constitution *does not* forbid the granting of the recognition plaintiffs here seek for their club. The second, assuming that the Establishment Clause *is* involved, is that, to the extent that any harm may be perceived in the recognition sought, such harm is far outweighed by the need to preserve and protect for the plaintiffs their rights of free expression and equal protection of the laws. These rights are now denied them in my view by reason of the refusal of recognition coupled with the circumstances described in paragraphs 19, 20, and 21.

* * * * *

Turning then to a discussion of the first technical ground for dissent, I respectfully suggest, on the facts before us, that the so-called recognition of their club which the plaintiffs seek would not, if granted, transgress upon what is proscribed by the Establishment Clause.[3] Proceeding with an orthodox effort to affirm the correctness of this proposition in the light of precedent, it must be conceded by the majority that there are only four latter-day opinions delivered by the United States Supreme Court dealing directly with religious activities of public school pupils during school hours. In three of these four opinions it was ruled that public schools cannot *sponsor* religious activities, and it requires only a cursory look at the facts of those cases to gain an insight into what was meant by the use of the term *sponsor*. Certainly, it was nothing even remotely akin to the "sponsorship" sought by the plaintiffs for their club.

In *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203 [92 L. Ed. 649, 68 S. Ct. 461], a school board *affirmatively required* 30-minute, religious-instruction periods to be held each week in the classrooms, using outside religious instructors under the control of the superintendent of schools. Participation was voluntary, but those not wishing to join in were required to go elsewhere in the building for some sort of secular instruction. Surely, such requirement can be readily characterized as directly athwart of the Establishment Clause as now interpreted.

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[3] As a practical matter, one wonders why the school authorities did not leave well enough alone and continue with their policy began on January 8, 1974. No one was objecting; there was no outcry from the community. What appeared to be reasonable to both the administration and the students was thwarted by the fateful opinion of the county counsel which spawned this litigation.

In *Engel v. Vitale*, 370 U.S. 421 [8 L. Ed. 2d 601, 82 S. Ct. 1261], the rules of the school board *affirmatively required* daily morning ceremonies in the classroom. These ceremonies took the form of a "denominationally" neutral prayer read word for word as composed by some state official or agency. This too was obviously violative of the rule against the state establishment of religion.

In *Abington School District v Schempp*, 374 U.S. 203 [10 L. Ed. 2d 844, 83 S. Ct. 1560], it was the state which *affirmatively required* daily reading in class from the Bible followed by the recitation of the Lord's Prayer. Student participation was voluntary, but the ritual was compulsory. Such a requirement was also found to be within the prohibition of the Establishment Clause.

However, the fourth of the group of cases noted is readily distinguishable from the other three. It is from this distinction that we can deduce the meaning of the word "sponsor" as used in this type of case. In *Zorach v. Clauson*, 343 U.S. 306 [96 L. Ed. 954, 72 S. Ct. 679], there was a weekly arrangement similar to that obtaining in *McCollum*. The difference, however, was that the weekly religious instruction was not held in the classroom and the instructors were not under the control of the school superintendent. The *accommodation* of such activity was held to be constitutionally permissible.

One might tend to see the distinction of *Zorach* from the other three as arising from the physical location of the religious activity and therefore condemn the activity for which plaintiffs seek sanction because it is intended to be conducted on school property. However, no such mechanistic simplicity is at the heart of the distinction. In the course of the opinion in *Zorach* the majority stated that the ground for outlawing the activity in

McCollum was that the use of the classrooms for religious instruction meant that the "force of the public school was used to promote that instruction." (*Zorach v. Clausen, supra*, 343 U.S. 306, 315.) From this it can be seen that it was the combination of classroom and mandatory instruction which was held to be constitutionally impermissible, the implication being, if *accommodation* only was involved, that religious activity could permissibly occur on the school grounds.

That this was the true basis for the distinction between *Zorach* and the other three cases can be traced in a series of lower court cases. In *Reed v Van Hoven*, 237 F. Supp. 48, 53, a federal district court upheld a truly voluntary on-campus prayer program which did not appear to have the imprimatur of the school. In *Lawrence v Buchmueller*, 243 N.Y.S.2d 87, a New York court found no Establishment Clause violation in a creche being allowed on school property under circumstances where "[u]nlike *Engel* . . . or *Schempp* . . . which concerned active involvement by Government in religious exercises, the present case constitutes, at most, merely a passive accommodation of religion . . . " (*Id.* at pp. 90-91.) In *Wood v. Mt. Lebanon Township School District*, 342 F. Supp. 1293, a federal district court found no Establishment Clause violation in allowing invocational and benedictional prayers to be said in on-campus graduation ceremonies where there was no "semblance of governmental establishment or even condonation." (*Id.* at p. 1295.)

The fact that the physical place of the religious activity is not the controlling factor was inversely confirmed in *Moore v. Board of Education*, 212 N.E.2d 833, where an Ohio court would *not* countenance a release-time program *off* the school campus where the facts indicated that, in the contemplation

of the pupils, it looked like the school was conducting the religious instruction. From this analysis it then can be conscientiously urged that it is a permissible governmental or state posture to accommodate the religious interests of school pupils on the school premises. Taking it a step further, in *Stacy v. Williams*, 306 F. Supp. 963, a three-judge federal court held *invalid* (on Equal Protection grounds) a University of Mississippi regulation which singled-out and forbade on-campus religious meetings, pointing out that the University's approval of any activity can easily be negated by merely announcing at the time that the university did not necessarily subscribe to its content. (*Id.* at p. 974.)

To afford guidance to a determination of just where one finds legal accommodation as contrasted to illegal sponsorship, the United States Supreme Court in *Lemon v. Kurtzman*, 403 U.S. 602 [29 L. Ed. 2d 745, 91 S. Ct. 2105], laid down a three-pronged test by which to measure the statute in question or, as here, the non-statutory state action represented by the school district's "recognition" of plaintiffs' club. To quote from *Lemon*, "[f]irst, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion [citation]; finally, the statute must not foster 'an excessive government entanglement with religion.' [Citation.]" (*Id.* at pp. 612-613.)

Measuring the proposed district action against the three criteria, both sides agree that the recognition procedure has a secular purpose. Proceeding to the second point, the majority reached the conclusion that the primary effect of recognition would be that "[t]he Bible study club would implicitly become an integral part of the school's extracurricular

program conducted during the school day when students are compelled by law to attend the school." I respectfully point out that they reached this conclusion as a result of their misconception of what "sponsorship" by the school actually entailed. Without explaining just how it would come about, the majority seems to take it for granted that the few simple procedures recited by Board Policy No. 5144 and Staff Rule No. 5144 would have a "primary effect" of advancing religion. Such view is implicit when they state that "[t]he 'primary effect' test bespeaks not only of financial assistance[4] but also necessarily inquires whether the consequence of state action is to place its imprimatur upon the religious activity [Citations.]" In effect, the majority have said it is impermissible because it is impermissible. They make no serious attempt to inquire into whether the activity in question might be accommodation under the *Zorach* concept as distinguished from sponsorship under *McCollum*, *Engel* and *Abington*, where sponsorship was tantamount to affirmatively requiring the activity which was stricken down.

As a consequence of the underlying basis for the distinction noted between *Zorach* and the other cases, I suggest on the facts of the stipulation that it would be more logical to characterize what is sought here by plaintiffs as accommodation. On the facts, the defendant school district, for more than 15 years, has not defined factually what it means to recognize these clubs. In addition, in January of 1974, it took action to allow the plaintiffs to proceed informally with their religious activities. From this I perceive that there was nothing anticipated by the non-lawyers then involved, or by

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[4]The free use of a classroom and the availability of heat and light

the other students, or by the parents of other students which would cause any commotion. The "recognition" sought here on the face of it was and is both peripheral and innocuous in terms of the school district's involvement. Actually, in practical result, it is very little different from what was countenanced by the order of January 8, 1974, before arrival of the legal opinion of the county counsel which I suspect no one welcomed. Anyway, perhaps this effort to argue by deduction is flaying the obvious, but it seems to me that when a factual question is as close as this one is, there is surely merit in giving some weight to the non-legal objectives initially found acceptable by the parties on both sides.

In sum, therefore, reviewing the facts as contained in paragraph 18 of the stipulation and noting the contents of Board Policy No. 5144 and Staff Rule No. 5144, I would hold that the recognition here sought by the plaintiffs would result only in an *accommodation* of the religious views and activities of the plaintiffs as permitted under *Zorach v. Clauson,supra,* 343 U.S. 306, and would not be impermissible *sponsorship* which I construe under the cases to mean affirmatively to require the religious activity challenged.

As a postscript to this portion of the dissent, I must respectfully observe that the kind of "divisiveness" which the majority foresees here has only been noted in those cases where the religious activity has been in some manner required. It is logically difficult to imagine how a completely voluntary program could be divisive.

* * * * *

The second ground on which I dissent from the result reached by the majority invokes the rights of plaintiffs under

the Free Expression Clause, First Amendment, as well as the Equal Protection Clause, Fourteenth Amendment, United States Constitution. This calls up for notice three comparatively recent decisions of the United States Supreme Court. *Tinker v. Des Moines Independent Com. Sch. Dist*, 393 U.S. 503 [21 L. Ed. 2d 731, 89 S. Ct. 733], holds that the rights to free expression guaranteed by the First Amendment are not shed by students when they cross the thresholds of the public schools. *Healy v. James*, 408 U.S. 169 [33 L. Ed. 2d 266, 92 S. Ct. 2338], held that public schools which maintain an ongoing program of recognizing student organizations that includes allowing student groups so recognized to use school facilities for meetings (Cf. Board Policy No. 5144 and Staff Rule No. 5144) cannot deny such recognition and use of school facilities on the basis of the subject of the proposed student activities. *Police Department v. Mosley*, 408 U.S. 92 [33 L. Ed. 2d 212, 92 S. Ct. 2286], extended the concept announced in *Healy*, decided the same day, and held that the government may not establish a public forum for the communication of ideas and then deny access to that forum on the basis of what is to be said.

In the light of these precedents, it can be logically urged that a public school district which recognizes student clubs and allows them the use of school facilities for meetings and communication purposes may not single out those student groups with religious interests and solely on that basis deny to those groups recognition where the result also is to deny them the use of meeting rooms and communication facilities equivalent to those granted to other student groups.

While *Healy* involved the efforts of the Students for a Democratic Society (SDS) to secure a forum at a Connecti-

cut State College, and while *Mosley* involved the action by a solitary postal employee in picketing a school and carrying a sign accusing it of racist policies which led to his conviction under a Chicago ordinance which forbade picketing of schools *except in labor disputes,* the decision in *Tinker* on its facts comes close to what is involved in the case at bench.

In *Tinker* the school sought to expel certain of its students who, in violation of a school regulation, wore black armbands on the school campus to express their disapproval of the Vietnam War. The students sought an injunction against enforcement of the regulation, and their complaint was dismissed by the United States District Court. The Court of Appeals, Eighth Circuit, affirmed without opinion. The United States Supreme Court reversed, and where there was an absence of any determination of facts which might reasonably have led school authorities to foresee substantial disruption of the school's operations, observed, "[c]learly, the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible. . . . Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. . . . The principal use to which the schools are dedicated is to accommodate students during prescribed hours for the purpose of certain types of activities. *Among those activities is personal intercommunication among the students.*" (*Tinker v. Des Moines Independent Com. Sch. Dist., supra,* 393 U.S. 503, 511, 512; emphasis added.)

Similarly, in *Garvin v. Rosenau,* 455 F.2d 233, the Court of Appeals, Sixth Circuit, reversed the United States District Court which had dismissed the plaintiffs' complaint arising from a refusal of a public school to recognize a chapter of the Student Mobilization Committee on the ground that it violated a school policy against student clubs which adhered to partisan points of view. This was in a context similar to that prevailing at Huntington Beach in that the school maintained an ongoing program of recognizing student clubs.

In the case now before us, the defendant district has itself determined that an ongoing program of student organizations is an appropriate forum for the discussion of ideas at its school. It cannot now deny that forum to plaintiffs on the basis of the subject matter of the ideas to be discussed. Had it not created that forum, plaintiffs would have no claim to use public property for Bible study purposes. (Cf. *Hunt v Board of Education of County of Kanawha,* 321 F. Supp. 1263, in which student prayer not connected with an ongoing student club program or any other school-established forum was held by a federal judge not to be privileged.) But the district has created an ongoing student club program, and the cases cited clearly show that these plaintiffs may not be excluded from the forum thus created unless, of course, the First Amendment which includes a guarantee of religious liberty is somehow construed so that religion is the one subject not protected by the freedom of a public forum.

The liberties of expression and association, the freedom of a public forum, and the right to the equal protection of the laws are in a sense all of a single fabric which is the fabric of free and equal communication involving the right

to *receive* communication as well as the right to *impart* communication. This right of communication has a value to weigh on the scales against whatever Establishment Clause value is involved in allowing these students to use an empty school room for Bible discussion purposes just as other students are allowed to use other empty rooms for secular discussion purposes.

What is the value of these communication rights? It might be argued that to deny these students the privilege of studying the Bible during lunch hour does not completely destroy their right to communicate. It only eliminates one subject matter, leaving communication perfectly open on all other subjects. Thus, the argument goes, there is not *really* much of an infringement upon communication. A not dissimilar argument was made in *Thomas v. Collins*, 323 U.S. 516 [89 L. Ed. 430, 65 S. Ct. 315], wherein a national labor union officer was held in contempt of an ex parte restraining order enjoining him from soliciting union members without first registering with the state. It was argued that it was a small thing to ask him to register. The court replied, "[t]he restraint is not small when it is considered what was restrained" and held that in weighing the value of First Amendment freedoms against the right of a state to exercise the police power, "it is the character of the right, not of the limitation" which is placed upon the scales of justice. (*Id.* at pp. 543, 530.)

To conclude this portion of my dissent, I can do no better than to defer to the comments of counsel for the plaintiffs who observes, "[t]he practical realities are that if students are to communicate with students on any subject they must do so where students come together: at school!

[Paragraph.] On one side of the scale is an empty school room. Being empty, it would hardly move the scale even if it were being balanced against nothing, especially since there is no governmental purpose other than to be fair, grant equality and give an opportunity for student intercommunication. On the students' side of the scale there is to be weighed almost every one of the freedoms that are most valued by our nation's fundamental laws."

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Before proceeding to a more fundamental quarrel with the constitutional authorities relied upon by the majority, it is necessary to dispose of the possibility that the recognition here sought would run afoul of the California Constitution. Without attempting to weave an argument that the provisions of the California Constitution, if deemed to forbid what is sought, would be void under the United States Constitution, a good case can be made that the activity which plaintiffs want recognized is not prohibited by the California Constitution.

Article XVI, section 5 of the California Constitution, formerly Article XIII, section 24,[5] provides in pertinent part, "Neither the Legislature, nor any county, . . . or other municipal corporation, shall ever make an appropriation, or pay from any public fund whatever, or grant anything to or in aid of any religious sect, church, creed, or sectarian purpose . . ." This section has been characterized by the Attorney General of California as "the definitive statement of the principle of

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[5] Article 13, section 24, formerly Article 4, section 30, which prohibited appropriation of public funds in aid of religious purposes or institutions, was repealed November 5, 1974. Article 16, section 5 was added to the Constitution on the same day.

government impartiality in the field of religion." (37 Ops. Cal. Atty. Gen. 105, 107.) It has been held under this section, that even if a statute has some identifiable secular objective, such fact will not immunize it from analysis to determine whether it also has the direct, immediate, and substantial effect of advancing religion. (*Frohliger v. Richardson*, 63 Cal. App. 209, 217.) In *Frohliger*, the court struck down a statute appropriating money for the restoration of the San Diego Misson although it concluded that secular (i.e., historical and cultural objectives), as well as religious ends, were aided by the statute.

However, this "section has never been interpreted . . . to require governmental hostility to religion, nor to prohibit a religious institution from receiving an indirect, remote, and incidental benefit from a statute which has a secular primary purpose. [Citation.]" (*California Educational Facilities Authority v. Priest*, 12 Cal. 3d 593, 605.)

In the case just cited, the state treasurer declined to proceed with the steps necessary to sell certain bonds authorized by the Educational Facilities Authority Act. (Ed. Code, § 30301 et seq.) Her reason for doing so was because questions had been raised concerning the constitutionality of the Act under then Article XIII, section 24. The "Authority," along with the University of the Pacific, sought a writ of mandate to compel the treasurer to proceed as called for by the Act. The Supreme Court issued the writ, holding that the Act neither violated the Establishment Clause of the First Amendment of the United States Constitution, nor the state constitutional proscription already noted.

In the course of the opinion, Justice Mosk states "[t]he benefits of the Act are available to all nonpublic institutions

of higher education in the state, whether sectarian or nonsectarian." (*Id.* at p. 601.) Invoking *Hunt v. McNair*, 413 U.S. 734 [37 L. Ed. 2d 923, 93 S. Ct. 2868] Justice Mosk continues, " . . . in evaluating the 'primary effect' of the legislation in [the cited case], the court reiterated its prior rejection of the argument, also advanced by respondent here, that all governmental assistance to a sectarian organization is forbidden under the establishment clause 'because aid to one aspect of an institution frees it to spend its other resources on religious ends.' [Citation.] Rather, a state may constitutionally 'provide church-related schools with secular, neutral, or nonideological services, facilities, or materials.' (*Lemon v. Kurtzman* (1971) . . . 403 U.S. 602, 616 [29 L. Ed. 2d 745, 757-758].)" (*California Educational Facilities Authority v. Priest, supra*, 12 Cal. 3d 593, 601.)

Accordingly, if the state can permissibly lend the massive power of its treasurer in aid of a sectarian institution to help finance the construction of educational facilities, it seems that to allow a group of high school students to use school rooms to discuss the Bible is well within the rule quoted. As stated further by Justice Mosk, "[t]here can be no claim in the instant case that the proposed project runs afoul of this test. As noted, the University of the Pacific is not affiliated with any religious organization. *But even if it were, neither the Act nor the proposed project would have the impermissible primary effect of advancing religion.*" (*Id.* at p. 601; emphasis added.)

So it can be observed here. Surely, to allow the plaintiffs to sit in a classroom at Edison High School and discuss the Bible in the presence of a faculty member, present to keep order if needed, cannot seriously be regarded as importing an

action by the district to "grant anything to or in aid of any religious sect . . . " (Cal. Const., art. XVI, § 5.)

* * * * *

It remains to give vent to what has increasingly troubled me about the trend of the decisions purporting to construe and apply the Establishment Clause. It is certainly not because of any arrogant delusions of Delphic prescience that I voice the lament which follows, but rather because I have long been awaiting this chance to express a deep concern which hopefully will fall upon interested ears and then be equally shared. What follows is a plea similar to that made by those valiant and persistent heroes[6] of almost 25 years ago, a plea which led to their triumph in *Brown v. Board of Education of Topeka*, 347 U.S. 483 [98 L. Ed. 873, 74 S. Ct. 686]. By that I mean to imply that constitutional pronouncements have no claim to immortality. Times change and previously obscured wisdom emerges. In *Brown*, the United States Supreme Court was finally persuaded by essentially sociological and psychological wisdom which had at last gained widespread acceptance among our citizenry that the "separate but equal" facilities doctrine as applied to schools for children of minority birth was untenable against the admonition of the Fourteenth Amendment that all persons shall enjoy equal protection of the laws.

In an analogous mode, I see the necessity for a re-evaluation of the cases construing the Establishment Clause. With due respect for the sincerity of those who have authored the cases relied upon by the majority, it seems to me that their sweeping interpretations of the simple phrase that "Congress

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[6]See Kluger, *Simple Justice* (1976)

shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . " (U. S. Const., Amend. I) have distorted all out of rational proportion both what the framers of the Constitution intended and what is fundamental to the survival of an ethical society. To give meaning and substance to this call for a change in the trend of the cases, I have chosen to quote extensively from an essay written by Frank Goble[7] for dissemination by the Thomas Jefferson Research Center of Pasadena, California.[8]

The essay, as a kind of text to build on, sets forth the following thought: "When a society is perishing, the true advice to give to those who would restore it is to recall it to the principles from which it sprung." Mr. Goble then proceeds.

"Russell Kirk is the author of a magnificent volume entitled 'The Roots of American Order.' It ought to be required reading in our schools and for everyone concerned about our society. The book traces the ideas from Egypt, Greece, Italy (Rome), Europe and other nations that became, in the creative minds of the Founding Fathers, the basis for the most successful society in history.

" 'Upon the classical and theological virtues,' writes Dr. Kirk, 'upon the social experience of the old world and the new, there was built by self-sacrifice and high imagination

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[7]I do not know Mr. Goble, but I have heard him s[illegible]k. My reason for choosing Mr. Goble's essay is that anyone would be hard pressed to improve upon his exposition of the points he makes which are the points I wish to make. The essay is not quoted in its entirety, but has been edited without sacrificing its thrust.

[8]The Thomas Jefferson Research Center is a non-profit corporation organized in 1963 for multi-disciplinary applied human research. The organizers were concerned over an increase in social problems and have sought to determine if the problem-solving methods of professional management could be successfully applied to the solution of human problems.

the intricate structure of personal and public order. Although no single human mind planned this order of ours, the wisdom and the toil of countless men and women have gone into its making.'

"It seems obvious [despite this] that something is seriously wrong . . . [A]t a time when we are spending more than ever on education, we see proliferating strikes by teachers, increasing violence and vandalism, and high school 'graduates' who are functionally illiterate. [O]n every level, our society is witnessing an alarming increase in irresponsible behavior.

"Systems, social or mechanical, function when the various parts are in order. Your auto mechanic, if he is a good one, knows why your car works. He has a mental image of a well-functioning automobile. But when your car doesn't operate, you don't want the mechanic to tell you about a well-functioning car, you want him to find out what's wrong and repair it.

"The same reasoning can be applied to our society. We need to understand the fundamental ideas that made our society great—Dr. Kirk has given us an excellent explanation of this. Then, if we are to recover our greatness, we must identify what has gone wrong and correct it. Thus, the urgent question becomes, what are the roots of American Disorder?

WHAT IS WRONG?

" . . . It is our opinion . . . that a basic cause for our society's exploding problems is personal and organizational irresponsibility. Irresponsibility is a social disease that, if left untreated, destroys individuals, families, communities, and nations. The world is littered with the ruins of societies destroyed by irresponsibility . . . .

"What causes irresponsible human behavior? Moral ignorance! Why is moral ignorance increasing in a society

which is spending more for education each year and more on education as a percentage of its total production than any other society in history? Walter Lippmann explained it quite succinctly years ago when he said, 'During the past 40 or 50 years, those who are responsible for education have progressively removed from the curriculum of studies, the Western culture which produced the modern democratic state. The schools and colleges have, therefore, been sending out into the world, men who no longer understand the creative principles of the society in which they must live. The prevailing education is destined, if it continues, to destroy Western civilization and is, in fact, destroying it.'

"There is more than enough evidence to prove that American education at all levels has indeed placed less and less emphasis on the cultural principles that provided the foundation for our national success. Dr. Benjamin D. Wood, former Director of the Bureau of Collegiate Education Research at Columbia University described it as, 'The lamentable disengagement of American education from its indispensable role in the moral, ethical realm which arose from a grieviously erroneous interpretation of the wise separation of church and state, which error in turn grew out of an older and unfortunately still widely-accepted error of confusing morality and ethics with one or another specific ecclesiastical affiliations' . . .

"John Nietz did a study of old textbooks and found that originally moral education was one of the principal objectives of our schools. According to Mr. Nietz, before 1775, religion and morals accounted for over 90 per cent of the content of school readers. By 1926, this was down to 6 per cent, and it is doubtless far less today, perhaps too small to be measured.

"Mr. Nietz says that to understand the decline of moral

values and the rise in vandalism and crime we need only to contrast the content of the McGuffey readers (first published in 1836-57) with the 'literature' inflicted on children today.

"Mr. Nietz says about the McGuffey readers: 'Such moral qualities as honesty, truth and truthfulness, obedience, temperance, kindness to humans and animals, thrift, work and patriotism were largely taught by means of actual human and situational stories . . . It has been recognized by students of history that the lessons in the McGuffey readers did much to set the standards of morality and of the social life in the pioneering West for more than half a century. Many of the truths and poetic expressions memorized from these readers were quoted by parents, preachers and others to counter acts of intemperance, vulgarity, laziness, brutality, dishonesty and lawlessness, which were altogether too common among frontier people . . . Many distinguished Americans who were reared west of the Appalachians . . . have acknowledged the deep debt they owe to the lessons learned from these readers.' . . .

"I could give many other examples to show that there has been a very substantial decline in educational emphasis on the moral and ethical concepts that provided the basis for American order. Educators have not merely de-emphasized our cultural heritage, in many cases they have taught that it is obsolete–some suggest that it was never valid. . . .

"If moral principles form the roots for American order, then moral relativism (the denial of moral principles) must form the roots of disorder. If this is the situation, how did it occur? How and why did our educational system shift from an emphasis on moral principles to an avoidance or even denial of principles? (In defense of our educational system it should be pointed out that most American have permitted, or at least

have not often objected to, this trend.)

"The answer, I am convinced, lies in an understanding of the behavioral sciences and their steadily increasing influence since about 1870. Dr. Willis Harman, former Director of one of the U. S. Office of Education's Educational Policy Research Centers, concurs. 'The religious tenets which form the undergirding of the values of the society,' he states, 'as well as for the overarching national purpose, reeled under the successive blows of the paleontologists, the evolutionists, psychoanalysts, and the positivistic behavioral scientists. By a half century ago or so they had been eroded away to such an extent that the society's value structure was, as it were, left hanging without support.'

"Abraham Maslow identified the behavioral sciences as playing a major role–perhaps the major role–in causing the declining emphasis on moral principles and individual responsibility in our schools.

" 'The ultimate disease of our time is 'valuelessness,' he stated, ' . . . this state is more crucially dangerous than ever before in history . . . It becomes more and more clear that the study of crippled, stunted, immature, and unhealthy specimens can yield only a crippled psychology and a crippled philosophy. The study of self-actualizing people must be the basis for a more universal science of psychology.' . . .

"A society cannot continue to exist without a workable system of values. 'Moral decay,' writes Charles Brough, in The Cycle of Civilization, 'has generally been a characteristic facet of every declining civilization.'

"One of the most widely read history books of all times is The Decline and Fall of the Roman Empire written in 1788 by Edward Gibbons. He set forth five basic reasons why that

great civilization withered and died. These were:

"The undermining of the dignity and sanctity of the home which is the basis for human society.

"Higher and higher taxes; the spending of public money for free bread and circuses for the populace.

"The mad craze for pleasure; sports becoming every year more exciting, more brutal, more immoral.

"The building of great armaments when the real enemy was within—the decay of individual responsibility.

"The decay of religion; faith fading into mere form, losing touch with life, losing power to guide the people.

" 'In studying the breakdowns of civilizations,' states Arnold Toynbee, 'we found that the cause was, in every case, some failure of self-determination, and that, when human beings thus lost control over their own destinies, this social disaster usually turned out to have been the consequence of a moral aberration.' At another time Toynbee wrote, 'I do not believe that civilizations are fated to break down, or that they have a fixed maximum life span . . . I do not believe either that civilizations break down through being worsted by their environment. I believe that, when they do break down, the cause is, not some blow from outside, but some inward spiritual failure—some kind of demoralization to which we human beings are not bound to succumb and for which we ourselves therefore bear the responsibility . . . '

"The roots of American disorder can be found in our institutions of education in the social and behavioral disciplines The dominant theories here have been inconsistent with and sometimes antagonistic to our traditions and tend to discourage individual responsibility. . . . "

* * * * *

To what has been quoted, particularly, " '[t]he lamentable disengagement of American education from its indispensable role in the moral, ethical realm which arose from a *grieviously erroneous interpretation* [emphasis added] of the wise separation of church and state . . . grew out of an older and unfortunately still widely-accepted error of confusing morality and ethics with one or another specific ecclesiastical affiliations,' " I would add that the "lamentable disengagement" noted has been aided and abetted every step of the way by a persistent and increasingly portentous rhetoric in the decisions of the United States Supreme Court whose authors fail to perceive the difference on the one hand between the prohibitions against the establishment of a state religion (which is all of an affirmative nature that the Establishment Clause was really ever intended to *prohibit*)[9] and on the other the countenancing of school teachers teaching theological, ethical, and moral concepts from all possible points of persuasion. What this has led to is a tyranny of the minority. The many teachers who share the views of Mr. Goble as above expressed are afraid to voice them, while those teachers who discount the moral and ethical foundations of our national heritage are free in the classroom to denounce that heritage with impunity.

Therefore, let there be a start on the road back, just as there was in *Brown v. Board of Education of Topeka, supra,* 347 U.S. 483, in the field of school segregation. In this area, let there emerge a rule of constitutional decision which clearly supports the accommodation concept announced in *Zorach v. Clauson, supra,* 343 U.S. 306. Such a rule should

[9] Actually, it seems that the latter portion of the admonition of the Establishment Clause has been wholly overlooked, i.e., where it says that "Congress shall make no law . . . prohibiting the free exercise [of religion]."

also make it plain that locally formulated curricula recognizing and implementing the need for moral and ethical training of school pupils not only are permissible but are to be encouraged.[10]

I would reverse the judgment and direct the trial court to grant the relief prayed for.

CERTIFIED FOR PUBLICATION.

McDANIEL,
J.

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[10]Lest this tract be construed by anyone to be an artfully disguised effort to promote and advance the teachings of the Bible, let it be known that I am an ardent and practicing Buddhist and a member of the Nichiren Shoshu Soka Gakkai.

DENIAL OF PETITION FOR REHEARING

In the Court of Appeal, State of California, Fourth Appellate District, Division Two.

4 Civ. No. 15738, County No. 228389.

BRUCE JOHNSON, et al., Appellants, vs. HUNTINGTON BEACH UNION HIGH SCHOOL DISTRICT, et al., Respondents.

[FILED MAR 30 1977]

BY THE COURT:

The petition for rehearing is DENIED.

Justice McDaniel is of the opinion that the petition should be granted.

TAMURA, J.,
Acting P.J.

Copies to:

County Clerk, County of Orange, Courthouse, Santa Ana 92701

Kenneth A. Roberts, 210½ Main St., Huntington Beach 92648

Rutan & Tucker, 401 Civic Center Dr. West, Santa Ana 92702

David A. Lehrer, 6505 Wilshire Blvd., Suite 814, L.A. 90048

DENIAL OF RELIEF FROM DEFAULT

OFFICE OF THE CLERK
SUPREME COURT OF CALIFORNIA
SAN FRANCISCO, CALIFORNIA
G. E. BISHEL, CLERK
415—557-0557

April 25, 1977

Kenneth A. Roberts, Esq.
210½ Main Street
Huntington Beach, California 92648

Re: 4 Civ. 15738 - Johnson v. Huntington Beach High School District

Dear Mr. Roberts:

Your application for relief from default and petition for hearing were presented to the court for its consideration.

The court directed that your petition for hearing be returned for the reason that the requested order to permit the untimely filing would not issue. The court seldom accedes to such requests and miscalculation of rule time does not constitute "good cause" to grant the relief. Your $25.00 check is also enclosed.

Very truly yours,

G. E. BISHEL
Clerk of the Supreme Court

By: J. L. Kavanagh
Chief Deputy

JLK:ct
Enclosures
cc: Messrs. Rutan & Tucker
David A. Lehrer, Esq.

PETITION REQUESTING COURT TO GRANT HEARING ON ITS OWN MOTION, PURSUANT TO CALIFORNIA RULES OF COURT, RULE 28(a), AND DECLARATION IN SUPPORT THEREOF. POINTS AND AUTHORITIES.

In the Supreme Court of the State of California.
4TH Civil NO. 15738
BRUCE JOHNSON, a minor, by Earl D. Johnson, etc., et al., Plaintiffs and Appellants, vs. HUNTINGTON BEACH UNION HIGH SCHOOL DISTRICT, et al., Defendants and Respondents.

[RECEIVED MAY 6 1977
Clerk Supreme Court]

I, KENNETH A. ROBERTS, am an attorney licensed to practice in the State of California. I am attorney of record in the above entitled matter, and request and declare as follows:

A petition for hearing before the State Supreme Court, in this matter, was filed one day late and relief from default was denied, stating inadvertance of attorney was not good cause for relief.

Due to the unusual nature of the case and the resulting circumstances subsequent to the opinion of the Appellate Court, this petition is submitted requesting the Supreme Court to exercise its power to review the decision of the Appellate Court on its own motion under the provisions of Rule 28(a) of the California Rules of Court, for the following reasons:

1. The rights and limitations of students on high school and college campuses, to gather together, on campus, voluntarily

for bible study and prayer, during free time such as lunch and non-class hours is being denied by the school authorities. School authorities are basing their decisions on the Attorney General's opinion and on the Appellate Court decision in the instant case, and existing school regulations regarding clubs and "organizations" on campus. The students and the school districts are now caught in the dilemma of where to draw the line as to what is allowable and what is not allowable as far as religious expression on campus.

The decision of the Appellate Court and the Attorney General's opinion have failed to provide the needed guidelines as to where to draw the line to such a degree that the school districts on both high school and college campuses are now denying any activity at all of group religious activity on campus either formal or informal by students.

2. The issues involved relate to a Federal question concerning primarily the establishment clause of the United States Constitution, on which the courts of California have made no prior decisions, and are of such importance as to deserve consideration by this Court based on the California Constitution to provide the needed guidelines for both students and school districts to prevent future litigation of the same issues.

3. A resolution of the very basic foundational issue of what expression of religious freedom is allowable on school campuses in California within the context of the California Constitution is needed to prevent further litigation in search of such a guideline.

As such, I request this Court to review the decision of the Appellate Court, and further to provide interpretation of said Appellate Court decision which will provide guidelines

for both students and school authorities which will both allow and limit religious expression within the meaning of the California Constitution with sufficient clarity to dispose of the need for future litigation on the same issues.

I declare under penalty of perjury that the foregoing is true and correct. Executed on May 2, 1977 in Huntington Beach, California.

KENNETH A. ROBERTS
Attorney for Plaintiffs and Appellants

POINTS AND AUTHORITIES

The power to order a hearing on its own motion is rarely exercised; it is chiefly invoked to allow consideration of an unauthorized or belated petition.

Witkins California Procedure 2nd Volume 6
page 4532.

Supreme Court will order cause transferred within 60 days after decision of district court of appeal, notwithstanding rule requiring petition for rehearing to be filed within 10 days after judgment of District Court has become final.

Hygienic Health Food Company vs. Grant,
188 Cal. 131, 204 P. 389.

Within 30 days after a decision of a District Court of Appeal becomes final as to that court, the Supreme Court, on its own motion, may order the cause transferred to itself for hearing and decision, and within the original 30-day period the Supreme Court may for good cause extend the time not to exceed an additional 30 days.

California Rules of Court, Title I, Div. I,
Rule 28(a).

Respectfully submitted,

KENNETH A. ROBERTS

Attorney for Appellants

Proof of Service by Mail attached showing service:
Clerk, Court of Appeal, Fourth Appellate District,
640 State Bldg., 303 W. 3rd St., San Bernardino,
California 92401;
County Clerk, County of Orange, 700 Civic Center
Drive West, Santa Ana, California 92701;
Office of the Clerk, Supreme Court of California,
4250 State Building, 350 McAllister Street,
San Francisco 94102;
Rutan & Tucker, 401 Civic Center Drive West, Santa
Ana, California 92702; and
David A. Lehrer, 6505 Wilshire Blvd., Suite 814, Los
Angeles, California 90048.
Executed May 3, 1977, at Huntington Beach, California,
by Aldora L. Thackeray.

Original and seven copies of above document forwarded to Supreme Court of California, together with letter dated May 3, 1977, indicating: "Also enclosed is the original and fourteen copies of Petition for Hearing which I am enclosing in the event my request is granted, and a check for $25.00 filing fee if needed. . . ." Signed: Kenneth A. Roberts.

LETTER DATED MAY 12, 1977

OFFICE OF THE CLERK
SUPREME COURT OF CALIFORNIA
SAN FRANCISCO, CALIFORNIA
G. E. BISHEL, CLERK
415—557-0887

Kenneth A. Roberts, Esq.
210½ Main Street
Huntington Beach, California 92648

Re: 4 Civ. 15738 - Johnson v. Huntington Beach
Union High School District

Dear Mr. Roberts:

At the direction of the court, we return herewith original and copies of a petition for hearing received on May 6, 1977. The petition was sixteen days late.

Except in extraordinary circumstances the court has not deemed miscalculation of time or the press of business as good cause for relief from default.

We also return your check in the amount of $25.00.

Very truly yours,

G. E. BISHEL

GEB:ct
Enclosures
cc: Messrs. Rutan & Tucker
David A. Lehrer, Esq.

Clerk of the Supreme Court

STATE OF CALIFORNIA)
) ss.
County of Orange)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, State of California, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 326½ Main Street, Huntington Beach, California 92648, that on JUNE 7th, 1977, I served the within PETITION FOR A WRIT OF CERTIORARI (BRUCE JOHNSON, etc., et al. vs. HUNTINGTON BEACH UNION HIGH SCHOOL DISTRICT, et al) on the following named parties by depositing the designated copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Huntington Beach, California, addressed to said parties at the addresses as follows:

Clerk, Court of Appeal
Fourth Appellate District
640 State Bldg., 303 W. 3rd St.
San Bernardino, Ca. 92401
No. 15738 [1 copy]

County Clerk, County of Orange
700 Civic Center Drive West
Santa Ana, California 92701
No. 228389 [1 copy]

Rutan & Tucker
401 Civic Center Drive West
Santa Ana, Ca. 92702
[2 copies]

David A. Lehrer
6505 Wilshire Blvd.
Suite 814
Los Angeles, Ca. 90048
[1 copy]

I declare under penalty of perjury that the foregoing is true and correct.

Executed on JUNE 7th, 1977, at HUNTINGTON BEACH, CALIFORNIA.

D. A. Standefer

Dean-Standefer, 326½ Main St., Huntington Beach, Ca. 92648
(714) 536-7161